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HAND BOOK OF HINDU LAW

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WITH A FOREWORD BY

The Hon'ble Mr. Justice N. S. LOKUR

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FIFTH EDITION

Revised and Enlarged



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FOREWORD

Hindu Dharma Shastra, as propounded in the ancient texts, deals with a wide variety of subjects, such as religious precepts, morality, caste obligations, penances and the duties of the rulers, whereas the Hindu law, as we understand it, is only a fragment of the Vyavahara law contained in the Smritis. Mr. Manek's book on Hindu law, though primarily intended for the use of students appearing for examinations, will be found very helpful by Judges, busy practitioners, and the general public who desire to acquaint themselves with the general principles of Hindu law. His exposition of the law is accurate and lucid, and I find that it has been brought up to date by references to the latest decided cases. But I am afraid that the usefulness of the book is likely to be shortlived, as the revised draft Hindu Code of the Hindu Law Committee has already been published and circulated for public opinion, and may be expected to be placed on the statute book within a measurable distance of time. It is needless to say that the proposed Code does not, in several matters, expound the Hindu law as laid down in the ancient texts or settled by recognised custom, but propounds a set of rules (some of them based on the ground of expediency), by which, in the opinion of the Committee, the Hindus should hereafter be governed. After the Code is enacted there will be hardly any occasion to refer to ancient texts for deciding any question of Hindu law.

Roughly speaking, the history of the administration of Hindu law may be divided into three periods, (1) from ancient times to the time of Vijñaneshwara, (2) thence to the advent of the British rule, and (3) from that date till now. During all the three periods reliance was placed on ancient texts as interpreted from time to time, and popular usage or well established custom was recognised as overriding the strict letter of the law as laid down in the texts. With the gradual evolution of the Hindu Society there arose a demand for modification of various rules of conduct prescribed by the texts. Those rules came to be divided into "advisory" and "mandatory" and the doctrine of *factum valet* was applied to a breach of the former. Further modifica-

tions were introduced during the third period by the enactment of statutes like the Freedom of Religion Act, 1850, Hindu Widows Remarriage Act, 1856, Special Marriage Act, 1872, and other more recent Acts relating to self-acquisitions, inheritance and succession. Several recent pronouncements of the Judicial Committee have also given rise to various moot points on the widow's power of adoption. All of these have been noticed in Mr. Manek's book at the proper places and, it is hoped, they will all be set at rest by the proposed Hindu Code. The Code now proposes to introduce many drastic changes, particularly in favour of women's rights, regardless of what has been understood to be the Hindu law till now, and it is bound to meet with a good deal of opposition. If and when the Code is placed on the statute book, Mr. Manek will have to re-arrange the contents of his book according to the sections of the Code and add his own notes and commentary to them. Till then it is hoped that the present book will be popular not only with the students for whom it is intended, but also with lawyers and laymen alike.

Bombay. }
28-8-1944. }

N. S. LOKUR.

PREFACE TO THE FIFTH EDITION

The present edition could not be brought out immediately after the previous edition was exhausted three years ago owing to several circumstances. The author is doing so now in view of pressing requests of some students of law and friends. He hopes that this edition will be found, like its predecessors, a safe and sufficient guide to the students to learn the principles of Hindu law, and an accurate and up-to-date reference book on the subject for the busy practitioners.

The important legislative changes after the publication of the previous edition are those introduced by the Hindu Women's Rights to Property Act (XVIII of 1937 amended by the Act XI of 1938) and the Arya Marriage Validation Act (XIX of 1937). The changes resulting from these Acts are noted at appropriate places and fully explained. Doubts were raised as to whether the former Act was *intra vires* the Central Legislature when it passed it. They have been resolved by the decision of the Federal Court delivered in 1941. The Act is held *intra vires*, but the word "property" occurring in the Act was held to mean property other than agricultural land in the Governors' Provinces, as the Central Legislature was not competent to legislate on such land when the Act was passed.

There have been several important pronouncements of the Judicial Committee of Privy Council and the Indian High Courts. All of them are noted and the principles laid down by them are incorporated at proper places.

This edition appears under the shadow of impending far-reaching legislative changes in Hindu law. The humble voice which the author had raised in his first edition in 1930 against piece-meal legislation on Hindu law is found to coincide with the view of an eminent and important section of the Hindus. There was also a vocal and insistent demand for the enlargement of the rights of women under the Hindu law. A demand for reform and codification of Hindu law was made, and this resulted in the appointment of the Hindu Law Committee under the chairman-

ship of Sir B. N. Rau. The Committee prepared drafts on the Hindu law of marriage and on the Hindu law of succession, intended to form chapters of a Hindu Code when it may be completed. These have been introduced in the form of bills before the Central Legislature, and are pending. The Committee has been reconstituted and is active. It has prepared a draft code on those topics on which the Centre can legislate under the existing constitution, and have recently circulated it for eliciting public opinion. The draft is a tentative one, intended to focus the attention of the public on the main issues, and the Committee intend to revise it in the light of public opinion.

The draft code, which is divided into six parts, deals with the following subjects : intestate and testamentary succession, and matters arising therefrom including maintenance ; marriage and divorce ; minority and guardianship ; and adoption. The parts dealing with the intestate and testamentary succession, and marriage are mostly based on the Bills pending in the Central Legislature. The task of the Committee has been a delicate and difficult one. They have been charged with the double duty of preparing a draft codification of the existing law, and of suggesting and incorporating in the draft necessary changes in view of the changed social and economic circumstances, and the requirements of the modern times. They are dealing with an ancient legal system, which is, at several important points, intermingled with the religion and deep-rooted religious conceptions of the people governed by the system. There are, further, the important differences in the system prevailing in one Province of British India from that in the other Provinces. The aim of the Committee appears to be to provide a uniform system for the whole of British India. Their task is complicated by the fact that under the Constitution Act, the Central Legislature cannot legislate on all the topics of the personal law. The spectacle of the Hindu Women's Right to Property Act, 1937, being not followed by the Provincial Legislatures enacting a similar Act regarding agricultural land in the Governors' Provinces is before us. The difficulty under the Constitution Act, I am afraid, would come in the way of the Committee's aim of giving a uniform law on several topics, and in their zeal to effect far-reaching reforms.

The Committee seem to have undertaken their task of pro-

posing reforms in the system with zeal and courage. The proposed draft includes revolutionary changes. For instance, it seeks to make the Hindu marriage monogamous, and to introduce a general law of divorce. It is fortunate that on this topic the Centre can legislate and there would be a uniform law if the proposed reform become law. Then, the Committee seek to give a death blow to the Mitakshara system of joint family, by their proposal that interest in joint family property shall devolve in every case by testamentary or intestate succession and not by survivorship. The question is, whether the general body of the Hindus are ready for such a radical change. In the pre-occupation of the country in the all-important task of winning the War, and the subsequent pre-occupation in the task of winning the Peace are bound to affect the serious consideration of such proposals of a whole-sale change in the law and may delay their being put on the Statute Book. The Committee are, however, doing the necessary preliminary work of focussing the public attention on the main issues and educating them for the proposed reforms.

The author is grateful to the Honourable Mr. Justice N. S. Lokur, in spite of His Lordship's arduous duties, for introducing this book by a Foreword. Coming from an eminent Judge like His Lordship, it is a source of strength and encouragement to the author.

Sub-Judge's Court, Erandol,
District East Khandesh. }
 31st August, 1944.

M. D. MANEK

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ADDENDA

(Important rulings reported after the relevant matter was printed.)

Add at p. 286. In a recent case, the Privy Council have held that translation of the term "*Avyavaharika* debts", used in Hindu law, by Colebrooke as "debts for a cause repugnant to good morals" makes the nearest approach to the true conception of the term and may well be taken to represent its correct meaning.

The duty cast by Hindu law upon the son to pay his father's debt being religious or moral, the character of the debt must be examined from the standpoint of justice and morality. The examination of the nature or character of the debt must be made with reference to the time when it originated; in other words, when the liability was first incurred by the father. If, on such examination, it is found that the debt is not tarnished or tainted with immorality or illegality, then it is binding on the son. This rule is not rigid but has to be applied with reference to the circumstances of each case. The above principles are not exhaustive but are basic.

A debt which in its inception is a just and true debt does not become *avyavaharika* merely by the subsequent dishonest conduct of the father in not paying it within time. Under a partition decree between members of a joint Hindu family, a promissory note of 1924 executed in favour of D, a member of the family, fell to the share of H, another member of the family. Under the terms of the decree D was bound to file it in Court within seven days. He did not file it and filed instead a forged promissory note of 1926 purporting to have been passed in renewal of the promissory note of 1924. When ultimately he filed the promissory note of 1924, the claim on it was barred by limitation. H filed a suit for the amount due under it against the debtors under the promissory note of 1924 and D. The claim against the debtors was dismissed as barred by time but was decreed against D. D died. The decree was sought to be executed against ancestral property in the hands of the sons of D. They resisted it on the ground that as the judgment debt was created by the misconduct and stupidity of D, they were not liable. Their plea was negatived by the Privy Council, as the debt in its inception was a just and true debt (*Hemraj v. Khem Chand*, 1944, 46 Bom. L. R. 503, P. C.).

Add at P. 289. Where the father in a joint Hindu family mortgages family property *not* for legal necessity *nor* for a purpose which is either illegal or immoral, and the property is sold in execution of a mortgage decree creating personal liability of the father and obtained against the father alone, the son's interest in the property passes on such sale by virtue of his pious obligation to pay his father's debt. It makes no

difference in such a case that the mortgagee is the auction purchaser (*Puttappa v. Banappa*, 1944, 46 Bom. L. R. 599).

Add at P. 65. It is reported in newspapers that a Full Bench of the Bombay High Court has recently followed the ruling of the Privy Council in *Anant v. Shankar*, and held that the adoption of a son to a deceased coparcener made subsequent to the death of the last surviving coparcener or the partition of the joint family property would be effective in getting for the adopted son his share in the joint family property as if he had been born prior to the death of the last surviving coparcener or before the partition of the joint family property was effected. It is also held that the Privy Council's decision overruled the decision of the Full Bench of the High Court in *Balu Sakham v. Lahoo Sambhaji*.

HANDBOOK OF HINDU LAW

CHAPTER I.

ORIGIN, SOURCES AND APPLICATION.

§ 1. **Nature and origin.** According to the Hindus, Hindu law is of divine origin, being derived from the Vedas, which are the revelations from the Almighty. Law, according to them, is a branch of Dharma, which is defined as "what is followed by those learned in the Veda, and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affections." The rules of Dharma should be ascertained from four sources, the Vedas, the Smritis, the conduct of the virtuous and one's own conscience. Dharma does not derive its sanction from any earthly power. It does not emanate from the Sovereign. On the contrary the Sovereign himself is not exempt from Dharma, his duties being strictly prescribed by it. The duty of a king is to ascertain the law from the reputed sources and then to enforce it.

According to European jurists, Hindu law is based upon immemorial customs, which existed prior to and independent of Brahminism. When the Aryans penetrated into India, they found that there were a number of usages, either the same as, or not wholly different from, their own. They accepted these usages, with or without modifications, rejecting only those that were incapable of being assimilated, such as polyandry, incestuous marriages and the like. Subsequently, Brahminism modified the ancient customs by introducing the religious element into legal conceptions; first, by attributing pious purposes to purely secular acts; secondly, by adding restrictions to those acts suitable to such pious purposes; and thirdly, by altering the customs themselves so as to further the special objects of religion or policy favoured by Brahminism (Mayne).

“What is ordinarily understood as Hindu Law is not the customary law of the country like the common law of England. Neither is it a Statute law in the sense that some King or Legislature framed the law and enforced its acceptance by the people. *The Hindu law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing the Hindus*” (*Mookka Kone v. Ammakutti*, 51 Mad. 1).

§ 2. **Distinctive features.** Hindu law differs from other legal systems of the world in its system of the joint family, the law of adoption, and the rules of succession and inheritance.

§ 3. **Why Hindu law is applied.** It has been the policy of the British, on their conquest of India, not to disturb the private law of the inhabitants of the country.* Statutes of Parliament and local legislation authorise and regulate the application of Hindu law to the Hindus. Although there is a variation in their language, the various enactments, which now prescribe the law to be administered in the provinces of British India, are in substantial agreement in making this provision : that, throughout British India, questions relating to succession, inheritance, marriage of the Hindus, and Hindu religious usages and institutions are to be decided according to Hindu law. Besides, in certain other matters such as adoption, guardianship, family relations, wills and partitions, Hindu law is applied by virtue of express legislation, or on principles of justice, equity and good conscience.

† It is not the whole of pure Hindu law that is now applied to the Hindus in British India. It is only in the matters enumerated above, matters most of which belong to the branch of *personal law*, that the rules of Hindu law are applicable to the Hindus, except in so far as these rules are varied or modified by legislation. The result is, that in British India there is no general territorial law governing these matters. While in the case

* Under what authority is Hindu law made applicable to Hindus by the Courts of British India? (April, 1941.)

† To what extent is Hindu law made applicable to Hindus by Courts in British India? (April, 1939.)

of the law of crimes, transfers, contracts, procedure, etc., there is only one set of rules governing the various communities of British India, the same principles giving a uniform rule of decision, whether the parties are Hindus, Muslims, Buddhists or Christians, in the branch of personal law we have one set of rules for the Hindus, another for the Muslims, a third for the Buddhists and a fourth for the Christians domiciled in British India. There are, therefore, several concurrent systems, the application of each one depending upon the religious persuasion of the parties to the transaction giving rise to the judicial proceeding. It is true that so far as the law of succession is concerned, the Indian Succession Act, 1925, purports to be the general territorial law of British India, but in exempting generally the important native communities of British India from its operation (*vide*, sections 29 and 58 of the Act), the Act is robbed of its general character.

§ 4. Sources of Hindu law. The direction of the legislature that the rules of Hindu law should be applied to the Hindus in the matters specified above supplies the 'formal' source of law to these rules. This direction, therefore, is the political sanction behind these rules, and settles the controversy which at one time existed among scholars as regards the reality and propriety of the term 'Hindu law.'

Some European scholars believed that the term 'Hindu law' was a misnomer, that the rules in question, being mere religious injunctions contained in the writings of the religious heads of the Hindus who had nothing to do with temporal matters, lacked political sanction and did not satisfy the Austinian analysis of law as being commands of political superiors to political inferiors who habitually obeyed them, and that, therefore, the term Hindu law was 'a mere phantom of the brain imagined by Sankritists without law and lawyers without Sanskrit.' On behalf of the defence of the term, cudgels were taken up by other scholars, notably by two of the Tagore Law Professors, Dr. Rajkumar Sarvadhikari and Sir Gurudoss Bannerjee.

* As regards the 'material' sources of Hindu law, we have (1) the Sruti, (2) the Smritis, (3) the Commentaries and

* Mention the sources of the Hindu and the Mahomedan law. Can you draw any comparison between them? What scope 'good conscience' and 'light of reason' find under the Hindu and the Mahomedan law? (April, 1931.)

Discuss the sources of Hindu law citing relevant texts. (Oct., 1937.)

Digests, (4) Judicial decisions, (5) Legislation and (6) Custom.

The original sources of Hindu law were the Sruti (that which was heard) and the Smriti (that which was

(1) The Sruti. remembered). The former are supposed to be the actual utterances of the Creator, the *ipsissima verba* of the divine revelation. The latter, although of divine origin, are couched in the language of the Rishis or ancient sages (*Sri Balusu v. Sri Balusu*, 22 Mad. 398). The Sruti comprise the four Vedas, the six Vedangas or appendages to the Vedas and the Upanishads. These contain very little of law, properly so called, although they contain facts from which rules of law may be inferred. What the Dharma Sutras quote from the Vedas on the subject of law is based partly on mere juridical construction of utterances, originally absolutely irrelevant; thus, for example, a vedic passage, the import of which is that Manu divided his property equally among his sons, is quoted to demonstrate that unequal division of property is forbidden.

The Smritis are the principal source of the lawyer's law, although they contain much that has nothing

(2) The Smritis. to do with law. The principal Smritis or Codes are of Manu, Yajnavalkya and Narada.

Manu, the ancient Hindu law-giver, mentions four sources of *Dharma* or law (1) the Vedas, (2) the Smritis, (3) the conduct (or customs) of the virtuous and (4) one's own conscience. "The Vedas, the Smriti, the approved usage and what is agreeable to one's soul (or good conscience) the wise have declared to be the quadruple direct evidence of *Dharma* (law)"—Manu, ii, 12. "The Sruti, the Smriti, the approved usage, what is agreeable to one's soul (or good conscience) and desire sprung from due deliberation, are ordained the foundation of *Dharma* (law)"—Yajnavalkya, i. 7. The Vedas and the Smritis constituted the primary sources of Hindu law, the Smritis, in case of a conflict, yielding to the authority of the Vedas or Sruti. The conduct of the virtuous, that is, the rule of guidance to be deduced from the practices of men learned in the Vedas, occupied in the beginning only a subsidiary and secondary place. But in the course of the development of the Hindu jurisprudence, it grew in importance in the guise of customs so that ultimately it acquired even an overriding authority over the Sruti and the Smritis, which place of authority it occupies even at the present day. In British India, however, a new set of rules and tests apply to establish its validity and recognition by the Courts (*vide infra*)

In case no light was available from any of the first three sources, an individual, who was "free from hatred and inordinate affections", was free to follow the promptings of his own conscience. The light of reason occupied a very subsidiary place in the sources of law, and its exercise was limited and circumscribed. Due to its indefiniteness it appears to have died a natural death. In British India, its authority would not be recognised on grounds of public policy. No such freedom is given to individuals. It is only to the Judge, administering justice, when he is given a discretionary authority in the matter, or where there is no rule of authority and the matter is to be decided on principles of justice, equity and good conscience, that some freedom is allowed for the exercise of the light of reason. But in the latter case, it has been well established that justice, equity and good conscience do not mean the judge's private opinion as to what is right or wrong, but the rules of English law in so far as they are applicable to Indian conditions (11 Bom. 551, P. C.)

It is interesting to note that original Muslim law also recognised four sources of law : (1) the Koran, (2) the Sunna or traditions handed down from generation to generation of the sayings and doings of the Prophet Mahomed; (3) *Ijmaa* or a rule of law arrived at by a consensus of opinion of the Muslim jurists of any particular age, and (4) *Kiyas* or analogical deductions made by the Judge from a comparison of the first three sources. But while in the case of the ancient Hindu law, the last two sources receded in the back-ground except in different forms, any text-book on Muslim law has even now to start with these four sources. Both the Hindu and Muslim legal systems claim a transcendental origin, and recognise the King only as a magisterial officer and not as a legislative head. The first source of law in both the cases is supposed to be a direct revelation, both the language and the sense being revealed. The second source of both the systems also is revealed so far as its sense is concerned, but the language in which it is expressed is of human origin. The Muslim law can make an additional claim of having as its founder one historical personage, and each of its four sources as an emanation from the Almighty, being either directly or indirectly connected with the Apostle of God, the Prophet Mahomed. Again, while the Koran, the first source of Muslim law, contains a large number of direct injunctions on the temporal affairs of life, and is really and substantially the first and primary source of law, in the case of the Hindus the Sruti is merely theoretically the first source of law. In the case of the Muslim law also, light of reason and good conscience were generally recognised as rules of guidance, and subsequently subsidiary sources giving scope to them were invented by the different schools of law (*vide*, the principle of *Istihsan* of the Hanafis, p. 7 of my Handbook of Muslim Personal Law, Third Edition, 1941). This list of sources in the case of both the Hindus and the Muslims has to be expanded in view of the changed conditions on the transfer of administration of law from the hands

of native rulers and native judges to the British Government and the British Judges, and these additional sources are practically common to both the legal systems. These are : (1) the Digests and Commentaries, principally the Mitakshara and the Dayabhaga in the case of Hindu law (*vide infra*), and the Hedaya and the Fatwa-i-Alamgiri in the case of Muslim law ; (2) Judicial decisions, (3) Legislation ; and (4) Custom. It may be noted that custom did not occupy a place of authority on law in the case of the original Muslim law except when a custom was covered by a tradition or *Ijmaa* (*vide*, p. 9, author's Handbook of Muslim Personal Law). And to complete this examination of the two systems on the point of sources of law, we might mention that according to later researches, in the case of both the systems, ancient customs of the people before the systems were promulgated and flourished form the ground-work on which the systems are built up.

After the Smritis, the next step in the development of Hindu law was the composition of a number of commentaries and digests based upon the Smritis or the Dharma Shastras and Sutras. The authority of the several commentaries necessarily varied in the different districts, and thus arose what are called 'the schools of law', which are operative in the different parts of India.

Schools of law. The differences between these schools seem to have arisen in the main from the different views expressed by the commentators, who were of authority in the different districts. The difference of customs of the districts may also have helped to differentiate the schools, both directly and indirectly, by influencing the opinions of the commentators. "The remoter sources of the Hindu law are common to all the different schools. The process by which these schools have been developed seems to have been of this kind ; works, universally or very generally received, became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text, and his authority having been accepted in one and rejected in another part of India, schools with conflicting doctrines arose" (*Collector of Madura v. Moottoo Ramalinga*, 12 M. I. A. 435). But it should be remembered that the commentaries are only commentaries ; they do not enact ; they explain and are evidence of the congeries of customs which form the law (*Jawahir Lal v. Jaran Lal*, 46 All. 192).

The two principal schools of Hindu law are (1) the Mitakshara and (2) the Dayabhaga. The Mitakshara school prevails throughout British India, except Bengal, where the Dayabhaga school prevails. The Mitakshara, from which the school derives its name, is a commentary on the Code of Yajnavalkya by Vijnaneshwara, who flourished in the latter part of the eleventh century. The Dayabhaga purports to be a digest of all the codes. It was written by Jimutavahan, who lived somewhere between the 13th and the 15th centuries. The Dayabhaga is of supreme authority in Bengal, but even in Bengal, the Mitakshara is regarded as a high authority on all questions in respect of which there is no express conflict between it and the Dayabhaga and other works prevailing there, *viz.*, the Dayatattwa and the Dayakrama Sangraha. Similarly, the Dayabhaga may also be referred to in a Mitakshara case on points on which the Mitakshara is silent.

Sub-divisions of Mitakshara School. Various treatises and commentaries were written on the Mitakshara. The difference in their interpretation of the Mitakshara has given rise to sub-divisions of the Mitakshara school, where, though all the sub-schools acknowledge the supreme authority of the Mitakshara, preference is given to certain treatises and commentaries, which control and explain some of its passages. Thus, for instance, the law of the Mithila school, a sub-school of the Mitakshara, is the law of the Mitakshara, except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara (*Sourendra v. Hari Prasad*, 5 Pat. 135, P. C.). But it has been held, that other books can be referred to only where the Mitakshara is silent or doubtful. Where the Mitakshara lays down a rule clearly, even though it contradicts other books of authority, it has to be followed (37 All. 604 ; 47 All. 427).

These sub-schools and the works which supplement the Mitakshara in each are : --

- (1) The Benares School : Virmitrodaya, Nirnayasindhu.
- (2) The Mithila School : Vivada Chintamani, Vivada Ratnakar.
- 3) The Dravida or Madras School : { Smṛiti Chandrika,
Parasara Madhava, and
Virmitrodaya.

- (4) The Bombay or Maharashtra School : $\left\{ \begin{array}{l} \text{Vyavahara Mayukh,} \\ \text{Virmitrodaya, and} \\ \text{Nirnayasindhu.} \end{array} \right.$

The geographical limits of these schools cannot be accurately defined. We may, however, say that the Benares School prevails in the North Bihar, Benares, Central and Western India, and the whole of Northern India. In the Punjab, it is considerably modified by custom. The Mithila school prevails in what was in ancient times the province of Mithila or Tirhoot and in the adjoining districts. The Dravida or Madras school prevails in the Madras Province, *i.e.*, the Southern India. The Maharashtra or Bombay school prevails in Gujarat, Kanara and the parts where the Marathi language is spoken as the local language.

As regards authorities in the Western India, the Vyavahara Mayukha of Nilkantha Bhatt is of paramount authority in Gujarat, the North Konkan and the island of Bombay. In the Maharashtra country, Northern Kanara and the Ratnagiri district, the authority of the Mayukha is inferior to that of the Mitakshara. Throughout the Western India, however, the Mayukha is of high authority, and its aid will be invoked, wherever the Mitakshara is silent or obscure. The well established principle of the Bombay High Court is to construe the two works so as to harmonise them with each other, whenever and in so far as that is reasonably possible (32 Bom. 300).

The usual law as to the Hindus in the province of Berar is the same as the Hindu law in the Province of Bombay (*Han-gir v. Bharathi*, A. I. R. 1925, P. C. 127) ; and, as regards authorities, the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon where the Mitakshara is silent or doubtful (A. I. R. 1926 Nag. 15).

Difference between the Schools. The Mitakshara and the Dayabhaga systems differ in two main particulars : (1) in some matters connected with the joint family system and (2) in the rules of inheritance. Under the Mitakshara system, rights in the family property are acquired by birth. The family is the unit, and individual rights are, generally, not recognised. As a rule, females have no rights of succession to the family property, which passes to the male members by survivorship. In Bengal.

rights in joint family property are acquired by inheritance or by will, the share of a deceased coparcener going to his widow in default of a nearer heir. In consequence of this difference, the power to alienate an undivided share in the joint family property differs in the two schools. In the matter of inheritance, the Mitakshara system founds the right of inheritance on the principle of *nearness of blood* and prefers agnates to cognates, generally. The Bengal school bases the right to inherit upon the principle of *the amount of spiritual benefit*, which the person claiming can confer by an offering to the manes of the deceased.

Mr. Mayne summarises the main points of difference between the Dayabhaga and the Mitakshara schools thus : -

(1) The Dayabhaga lays down the principle of religious efficacy as a ruling canon in determining the order of succession ; so it rejects the preference of agnates to cognates, and arranges and limits the cognates upon principles peculiar to itself.

(2) It denies the doctrine that property is by birth, which is the foundation of the joint family system, treats the father as the absolute owner of the property, and gives him unrestricted powers over it.

(3) It regards the brothers and other collateral members as holding their shares in *quasi* severalty, as tenants-in-common, and recognises their power to alienate or devise their shares while still undivided.

(4) It recognises the right of a widow in an undivided family to succeed to her husband's share, if he die without issue, and to enforce a partition on her own account

The sub-divisions of the Mitakshara school differ between themselves and from the Bengal school in some questions of adoption, stridhana and inheritance. The Bombay school differs from all the other schools, in recognising the largest number of female heirs and in giving greater powers to females either as absolute or as limited owners.

Although, in theory, Hindu law is ultimately based upon the Vedas, in matters of law the Vedas are of no

Commentaries
supersede ancient
texts.

greater authority than the Smritis. In modern practice, the first place is given to the Commentaries and Digests, which are based upon the Smritis. "The duty, therefore, of

an European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage" (*Mootloo Ramalinga's case*). It is not open to a Court administering Hindu law to draw fresh conclusions from the original Hindu law texts, but it is its duty to ascertain whether a particular doctrine of Hindu law has been received by the particular School of Hindu law prevailing in the district in which the case has arisen (A. I. R., 1940 Pat. 61 ; A. I. R. 1942 Cal. 311). "It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law ; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognised ... It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted" (per Sir Shadi Lal in *Atmaram v Bajirao*, 37 Bom. L. R. 553, P. C.).

The pride of place is now given to judicial decisions, as almost all the points of Hindu law are to be found in the law reports. The decisions have played a considerable part in ascertaining, and sometimes, in developing and crystallising Hindu law, and in this sense judicial decisions may be said to be a source of Hindu law. The Courts in India necessarily follow the decisions of the Judicial Committee of the Privy Council, and of the High Courts to which they are subordinate.

(4) Judicial decisions.

The important Acts of the Indian Legislature that have modified or supplemented Hindu law are the following :

(5) Legislation.

- (1) The Caste Disabilities Removal Act (also known as the Freedom of Religion Act), 1850, provides that no right or property of a Hindu is forfeited, nor is his right of inheritance in any way impaired, by reason of his or her renouncing, or being excluded from, the communion of any religion, or being deprived of caste.

- (2) The Hindu Widows' Remarriage Act, 1856, legalises the remarriage of widows and makes legitimate the issue of such marriages.
- (3) The Indian Penal Code, 1860, supersedes the whole of the Hindu law of crimes.
- (4) The Native Converts' Marriage Dissolution Act, 1866, provides that a Hindu husband or wife 'when converted to Christianity can have the Hindu marriage dissolved, if the other spouse refuses to cohabit with such convert.
- (5) The Indian Contract Act, 1872, supersedes the Hindu law of contract, except the rule of Damdupat which lays down that interest exceeding the amount of the principal cannot be recovered at any one time.
- (6) The Indian Evidence Act, 1872, supersedes the rules of the Hindu law of evidence.
- (7) The Indian Majority Act, 1875, which fixes the age of majority on the completion of the 18th year, applies to the Hindus, except in matters of marriage, divorce and adoption.
- (8) The Transfer of Property Act, 1882, supersedes the whole of the Hindu law of transfer excepting certain matters referred to in Secs. 2 and 129 (gifts) of the Act. But by the Amending Act XX of 1929, from the 1st April 1930, Chapter II of the Act has been applied to the Hindus and the law of gifts of the Hindus is also governed by the amended Act.
- (9) The Special Marriage (Amendment) Act, 1923, permits a Hindu to contract a valid marriage with a person belonging to any caste or with a person professing the Jain, Sikh or Buddhist religion.
- (10) The Indian Succession Act, 1925, sections 57, 58 and 214 provide rules regarding formalities of a valid will, *etc.*
- (11) The Hindu Disabilities Removal Act, 1928, removes certain disabilities which excluded a Hindu from inheritance or a share on partition.

- (12) The Hindu Law of Inheritance (Amendment) Act, 1929, makes certain changes in the order of succession in the Mitakshara law.
- (13) The Hindu Gains of Learning Act, 1930, secures to a member of a joint Hindu family his acquisitions made substantially by means of learning, irrespective of the fact that he received his learning at the family expense.
- (14) The Hindu Women's Rights to Property Act, 1937, gives new rights of inheritance to the widows and materially affects the Mitakshara coparcenary.

* "Immemorial custom is transcendent law," says Manu.

As a branch of Hindu law, custom plays an important part and within the limits in which its operation is now confined it modifies or supplements the written law. Custom is an independent source of law, and when it is universally adopted, it should supersede the provisions of the written law, for, "under the Hindu system of law, clear proof of usage will outweigh the written text of the law" (*Moottoo Ramalinga's case*) .

Custom is a rule which in a particular family or a particular district has from long usage obtained the force of law (*Hurpurshad v. Sheo*, 3 I. A. 259).

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be *ancient and invariable*, and it is further essential that they should be *established to be so by clear and unambiguous evidence*" (*Ramalakshmi v. Shivanantha*, 14 M. I. A. 370 ; *vide*, 30 Bom. L. R. 1558).

The essentials of a valid custom are that it must be *ancient, definite, continuous, notorious and reasonable*. It is invalid, if it is opposed to an express enactment of the legislature, to mora-

* Write short note on : (1) Custom as a source of Hindu law (Oct., 1941 ; April, 1943.) (2) Essentials of a valid custom under Hindu law. (April, 1940).

lity, to public policy, or to justice, equity and good conscience (51 Mad. 1).

In the case of persons governed by Hindu law, the burden of proving a custom derogatory to that law is upon the person who asserts it. So far as continuity is concerned, there is a distinction between a family custom and a local custom.

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ance of a custom.

In the case of a family custom, it is competent to the family to discontinue the custom, *e. g.*, a family custom that property should remain impartible is destroyed by the family subsequently treating it as if it is partible. But in the case of a local custom, the omission of individuals to follow the custom cannot have the effect of destroying it, as it is a part of the law of the land and binds all the persons within the local limits in which it prevails. When the existence of a custom has been proved, the burden of proving its discontinuance is upon the party who alleges its discontinuance.

§ 5. Persons governed by Hindu law. * A question of much practical importance and not altogether free from doubt is—Who are governed by Hindu law? The readiest answer which one would be tempted to return to the question is, that the Hindus are the persons who are governed by Hindu law; and this, no doubt, is in accordance with the provisions of the enactments authorising and regulating the application of Hindu law.

But the question then arises, who are the Hindus? The term 'Hindu' is not very definite in its significance. It is of foreign origin, and is derived from the word 'Indus' or 'Sindhu'. It was used by the Muslims to designate people living to the east of that river. Etymologically, therefore, the term applies to an inhabitant of India, and has a *territorial* significance. But this evidently is not its meaning in the enactments. And it has been held that the term 'Hindu' in the Indian Succession Act is used in a *theological* as distinguished from a national or racial sense, and that any person of a non-Hindu origin can become a Hindu

* What persons are governed by Hindu law? (April, 1938.) Comment on the following: "The question who are governed by Hindu law is not easily answered by saying that all Hindus are governed by it." (March, 1939.)

by conversion (*Ratansi v. Administrator-General of Madras*, 52 Mad. 160 : *Kamavati v. Digbijai*, 49 All. 525, P. C.).

It remains, however, to ascertain who are Hindus by religion. For our present purpose, we may divide the population of India into three sections : (1) the descendants of the aboriginal tribes, who have more or less avoided complete conversion to the Brahminical religion ; (2) the descendants of the early Aryan settlers and of such aboriginal races as have been completely absorbed in the Aryan community ; and (3) modern settlers of various other religious persuasions, such as the Muslims, Christians and Parsis. As the third section can never be confounded with the Hindus, we may leave it out of consideration except that by a clear act of conversion to Hinduism they might become Hindus. The first section comprises a considerable portion of the population of the Madras Presidency and Central India, and the hill tribes of various other parts of India. Their customs and religion differ widely from those of the Hindus properly so called. They have no code of law, but in some instances they have adopted much that is Hindu in their customs and religion. These tribes are generally governed by their customary law and such parts of Hindu law as are adopted by them. The second division, which comprises the Hindus properly so called, has never been completely homogeneous in religion, and it has thrown off various sects at different times. But as this heterogeneous body and its numerous off-shoots admit more or less the authority of the Vedas, and conform to a few other fundamental tenets of the Brahminical faith, the highly tolerant character of their faith admits them all as being within the pale of orthodoxy, and so they may all be regarded as Hindus so long as they have not openly abjured Hinduism by seeking conversion to an alien faith like Christianity or Islam. There are only three Indian sects of importance—the Buddhists, the Jains and the Sikhs—who have entirely repudiated Brahminism, and who ought to be excluded from the category of the Hindus (Bannerjee, pp. 16-20). But so far as the Jains and the Sikhs are concerned, it has been held by the Privy Council that they are governed by Hindu law, except so far as such law is varied by custom (*Sheo Singh v. Dakho*, 5 I. A. 87 ; *Bhagwan Koer v. Bose*, 11 I. A. 249).

The result may be summarised by stating that Hindu law applies to—

(1) the Hindus by birth as well as religion, *i.e.*, born Hindus who have not openly abjured the Hindu religion ;

(2) the Hindus by religion, *i.e.*, persons belonging to an alien faith who have sought an open conversion to Hinduism ;

(3) aboriginal tribes who have been completely absorbed in the Hindus ; and

(4) dissenters from Hinduism, such as the Jains, the Sikhs and others who have not their separate codes.

The expression “Hindus” includes not only persons, who profess what is called the Hindu religion, but also such of their descendants as have not openly abjured that religion or not formed themselves into a community so distinct from the Hindus that they cannot properly be regarded as Hindus. Hindus need not be orthodox. According to Dr. Gour, the term “Hindu” includes not only those who are Hindu by religion but also those who are commonly known as such. The test he applies in determining whether a particular community is Hindu or not, is how they regard themselves and how they are regarded by the rest of the Hindu community. Degradation from caste or a departure from the standard of orthodoxy in matter of diet or ceremonial observance, provided it does not amount to a renunciation of religion, does not prevent the application of Hindu law (6 Pat. 506).

Except so far as Hindu law may not be consistent with the new religion, if any, adopted by persons who have renounced the Hindu religion, such law continues generally to apply to such persons and to their descendants. But, Hindu converts to Muslim religion, which itself regulates the devolution of property, are bound by the Muslim law, except that, on proof of a well-established custom, it was held they might continue to be governed by Hindu law. *This exception, however, was restricted only to matters of succession and inheritance.* Such a custom was well-established in the case of the Khojas, the Cutchi Memons, the Sunni Bohras of Gujarat, the Molesalam Girasias and the Halai Memons of Kathiawar. The Bombay Memons follow the Muslim law. But in view of the passing of the Mus-

lim Personal Law (Shariat) Application Act, 1937, the custom in the communities mentioned above ceases to be applicable and these Muslim communities are governed by the Muslim Personal Law in the matters of succession and inheritance also (*vide* author's Hand-Book of Muslim Personal Law, 3rd Edition, page 13).

Before the passing of the Indian Succession Act, 1865, native Christian converts from the Hindu religion could elect either to adhere to or renounce the Hindu law of succession. But the Act has brought under its provisions all native Christians, whether they have or have not elected to remain subject to Hindu law. A Hindu convert to Christianity is now solely governed by the Indian Succession Act (*Kamavati v Digbijai*, 49 All. 525, P.C.).

It has been held that the term "Hindu" in the Indian Succession Act has been used in a theological sense, as distinguished from a national or racial sense. A person of non-Hindu origin may be converted to Hinduism so as to become subject to Hindu law. * Though mere profession of a theoretical allegiance, or admiration and advocacy of Hindu practices, is not sufficient, a European becomes a Hindu, if he discards his religion by birth by a clear act of renunciation and adoption of Hinduism and takes to the Hindu mode of life. Of course, such a convert does not on conversion get any caste, but membership of a caste is not a necessary pre-requisite to being a Hindu (*Rattansi v. The Administrator-General of Madras*, 52 Mad. 160). When a marriage was performed according to Vedic rites by a Hindu male with a Christian woman, who before the marriage was converted to Hinduism, such a marriage was regarded as a Hindu marriage which allows polygamy, and the husband was not held guilty of bigamy, when he married again during the lifetime of the converted wife (*Muthuswami v. Masilamani*, 7 M. H. C. R. 121).

* By what law are the following governed in matters of succession and inheritance :—(i) Christian Converts to Hinduism ; (ii) Halai Memons domiciled in Bombay ; (iii) Sunni Bohras of Gujarat ; and (iv) Illegitimate children of a Hindu father by a Mahomedan woman ? (April, 1932 and 1939.)

Hindu law will apply to persons, who were born Hindus, but had renounced Hinduism, provided that they revert to it after performing expiatory ceremonies. A Hindu, having renounced Hinduism once, can revert back to it. Among Sudras, no particular form of expiatory ceremony is necessary for valid reconversion in absence of custom to that effect in the convert's caste (A. I. R. 1940 Mad. 513; A. I. R. 1942 Mad. 193). The mere fact that a person who has renounced Hinduism makes a declaration that he has become a re-convert to Hinduism is totally inadequate to make him a Hindu in absence of other evidence (A. I. R. 1937 Mad. 172).

In the absence of a special custom, Hindu law is applied to Jains, Sikhs, Nambudri Brahmins, Lingayats and to members of the Arya or the Brahmo Samaj

Masses of non-Aryan tribes, notably, in Southern India, have been *hinduised* and subjected to Hindu law. It is by virtue of such assimilation that the principles of Hindu law have now come to be applied to various non-Aryan tribes, such as the Raja Bansis of Bengal (50 Cal. 727), Thiyyas of Malabar (13 L. W. 101), Maravers of Tinnevely (6 M. H. C. R. 310), Bhils and Santals of Assam (24 C. W. N. 173), the Yadhavas of Madras (51 Mad. 1), *etc.* Similarly, principles of Hindu law have been applied to a community like that of dancing girls (A. I. R. 1926 Mad. 1).

The illegitimate children of Hindu parents are within the expression "Hindu". The illegitimate children of a Hindu mother by a Christian father are treated as Hindus, provided they have been brought up as Hindus. But where the mother is a non-Hindu, the children cannot be treated as Hindus, even though the father may be a Hindu (*Charanjit Singh v. Amir Ali*, 2 Lah. 243).

Sons of Hindu dancing girls of the Naik caste, converted to Islam, will be governed by Hindu law, if they are brought up as Hindus in the family of their Hindu maternal grandparents.

Descendants of Hindus, who have married Buddhist Burmese women, are not Hindus. A Gond is not a Hindu and he is not governed by Hindu law, except what he has adopted of it (A. I. R. 1930 Nag. 57).

§ 6. Migration and Schools of law. *A Hindu is presumed to be governed by the law of the

Migration within
India.

school which governs the locality in which he resides, and if nothing more is known about a Hindu except that he lived in a particular place, it will be assumed that his personal law is the law which prevails in that place. But Hindu law, being personal law, is not affected by a change of domicile, and, therefore, a family migrating into another locality is presumed to have carried with it its own laws of succession, family rights, *etc.* Hence, when it is shown that the family has come to reside in the place from another part, the presumption is that the law of origin governs the family, until the adoption of the law of the new domicile is proved (*Parbati v. Jagadis*, 29 I. A. 82). "Where a Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local law, this new custom must be affirmatively proved to have been adopted" (*Abdurahim v. Halimabai*, 43 I. A. 35). Where a Hindu family migrates from the N. W. Provinces, where the Mitakshara law prevails, to Bengal, where the Dayabhaga law prevails, the presumption is that the family continues to be governed by the Mitakshara law (*Parbati's case*).

So great is the tenacity with which the Hindus hold to their ancient usages, and follow their ancient traditions and customs that mere length of time in itself makes no difference. A Maharashtra Brahmin resident in the Central Provinces is to be governed by the Bombay School when migration is not proved, in the sense that the exact origin of the family cannot be traced (A. I. R. 1938 Nag. 163).

This presumption may be rebutted by showing that the family has abandoned the law of origin and has adopted the law of the province where it has settled. The burden of proving such abandonment and adoption lies on the party setting it up, and the burden can be discharged by showing that in the matter of

* Comment briefly upon the following : "Where a Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law." (April, 1922.)

Write short note on : Effect of migration on persons governed by Hindu law. (April, 1940.)

devolution of property, the rules obtaining in the country of adoption have been accepted as rules governing the family. After proof of adoption of the new law, it is not permissible to a *single* member to revive the old law (50 Cal. 370). The mere transfer of a district from one Province to another for administrative purposes would not be sufficient to affect the personal law, unless and until it is shown in the case of any resident that he intended to change and had in fact changed his personal law. North Kanara, which was originally a district of the Madras Province, was transferred for administrative purposes to the Bombay Province in 1861. Hence, the rule of the Madras School that the adoption of a married man is invalid applies to the residents of North Kanara and not the Bombay rule allowing such an adoption (*Somasekhara v. Sugutur*, 1936, 38 Bom. L. R. 317, P. C.).

In the case of migration out of India, the presumption that they have accepted the law of the people whom they have joined seems to be one that should readily be made. Where a family emigrated from India to East Africa, and being themselves Muslims (*e.g.*, Memons) settle among Muslims they are presumed to have adopted the Muslim law. The analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration *within* India (*Abdurahim v. Halimabai*, 43 I. A. 35).

It is the law in force in the province at the time of their leaving it which continues to govern the persons who have migrated to another province. They would, therefore, be affected by the decisions of the courts of the province of their origin which declare the correct law of the province up to the time of their leaving it, but not by customs incorporated in its law, after they have left it (*Balwantrao v. Bajirao*, 47 I. A. 213).

CHAPTER II.

MARRIAGE.

§ 7. **Nature.** According to Hindu law, a marriage is not a contract, but is a sacrament. It is one of the *sanskaras* or purificatory ceremonies necessary under Hindu religion for the purpose of purifying the body from the inherited taint. The Hindu Shastras have enjoined marriage as a duty, because an unmarried man cannot perform some of the most important religious ceremonies. Thus, the Hindu marriage is a holy union between a Hindu man and woman for the performance of religious duties. The union is indissoluble in life and subsists even after the death of the husband. Conversion to an alien faith, degradation, or loss of caste, does not dissolve the marriage tie among the Hindus.

§ 8. **Who can marry.** *Every Hindu is competent to marry, in spite of infancy or infirmity. No deformity or disease, not even congenital impotency, nor even leprosy or such other loathsome disease, can stand in the way of a Hindu's right to contract a marriage. Even idiocy or lunacy is no disqualification. The marriage of a Hindu lunatic, though improper and immoral and discouraged by Hindu law, is not invalid if duly solemnised (*Bhagwati v. Parmeshwari*, A. I. R. 1942 All. 267). The same view is taken by the Full Bench of the Madras High Court, where the congenital idiot's father had arranged his marriage and the idiot had issue by the wife (*Aminthammal v. Vallmayit*, A. I. R. 1942 Mad. 693). As the Hindu marriage is not a contract, the mere fact that it was brought about during the minority of a party or without his consent does not render it invalid. The marriage of Hindu children is often brought about during their minority and the children themselves exercise no volition (*Purshotamdas v. Purshotamdas*, 21 Bom. 23). A Hindu marriage

* Comment briefly on the following : "A Hindu marriage is the performance of a religious duty, not a contract ; therefore the consenting mind is not necessary". (March, 1922.)

To what extent physical capacity and consenting mind are necessary for validity of a Hindu marriage ? (April, 1938.)

is a sacrament and not a civil contract ; it is not, therefore, permissible to apply to Hindu marriages all the principles of the law of contract. But, then, fundamental principles like freedom of consent by some responsible person, if not by the spouses themselves, ought not to be ignored. Hence if the marriage ceremonies are brought about by force or fraud, the marriage is invalid (A. I. R. 1937 Mad. 332 ; 11 Bom. 247 ; 12 Cal. 140 ; 14 Mad. 316). When the boy did not intend to go through the form of marriage, which he was forced to go through by the friends of the girl, and none of the boy's relatives or friends was present, the marriage was held invalid (A. I. R. 1937 Mad. 332). After the passing of the Child Marriage Restraint Act, 1929, as an indirect result of the Act, marriages of males under 18 and of females under 14 would be prevented. This Act does not render such marriages void ; it simply lays down certain punishments for persons guilty of a breach of its provisions.

Under Hindu law, a man can marry any number of wives, though he may have a wife or wives living. But polyandry is not allowed, except to the extent permitted by custom, as in certain communities of Malabar. The Brahmos who marry under the Special Marriage Act, 1923, are restricted to monogamy.

§ 9. Forms of marriage. The ancient Hindu text-writers mention as many as eight different forms of marriage. Of these eight, only two are recognised now, the others being merely of historical importance. "So far as the eight forms of marriage referred to in the Shastras are concerned, it is now accepted law that all except the Brahma and Asura forms are obsolete" (48 Mad. 1). "The Brahma is one of the four old approved and the Asura, one of the four unapproved forms. But even these forms have lost their old significance. The old Brahma form, which was applicable to Brahmins only, was "the gift of a daughter, after decking her with costly ornaments and honouring her by presents of jewels, to a man learned in the Veda and of good conduct, whom the father invites" (Manu). In the Asura form, "the bridegroom receives the maiden after having given as much

* Explain the term : Brahma Marriage. (Oct., 1933.)

Discuss the various forms of marriage in Hindu law. (Oct., 1940.)

What forms of marriage are recognised at present under Hindu law ? (Oct., 1941.)

as he can afford to the kinsmen and to the bride herself according to his own will" (Manu). The Asura form was permissible to Vaishyas and Sudras, but not to Brahmins and Kshatriyas. But now both the forms are open to Hindus belonging to any caste, and the only distinction left between the two forms is *the presence or absence of a money consideration*. A marriage would be in the Brahma form, if the father or other guardian, who gives the girl in marriage, does not receive any consideration from the bridegroom for giving the girl in marriage. But if he receive such consideration, which is technically called *Sulka* or bride's price, the marriage would be one of the Asura form even though it may have been performed with all the ceremonies of the orthodox Brahma form. Thus *the Brahma form*, as we now understand it, is *the gift of a girl, pure and simple, while in the Asura form, it is the sale of the bride for pecuniary consideration*. The distinctive feature of the Asura form of marriage is the giving of money's worth to the bride's father *for his benefit or as consideration for giving the girl in marriage* (58 Mad. 488). Any payment made to the bride or her mother will not render the marriage one of the Asura form, for the taint, attaching to this form, consists in the gratuity paid to the *giver* of the bride and not in anything paid to bride or to her mother (*Chunilal v. Surajram*, 33 Bom. 433). If the present is given to the girl or to her father for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of *Sulka*, but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of *Sulka* (A. I. R. 1941 Mad. 618). Mere customary presents in cash and cloth would not necessarily amount to payment of bride price. So also the mere fact that the whole expenditure is borne by the bridegroom or the fact that the marriage took place at the bridegroom's house according to a usage prevailing in his caste would not convert a marriage, which is otherwise in the Brahma form, into one in Asura form (A. I. R. 1938 Mad. 479).

When there is a question as to whether a marriage was in the Brahma or the Asura form, the Court will presume that it was in the Brahma form (38 Cal. 703, P. C.). It is incumbent on the party who alleges that a particular marriage was in the Asura form to prove that bride price was paid in respect of the

marriage by the bridegroom or his people to the bride's father (A. I. R. 1938 Mad. 479).

Though the Asura marriage is treated as valid when it is performed, no contract relating to the bride-price can be enforced, as *marriage brokerage contracts* are against public policy. But if the money consideration is actually paid and the marriage ceremony completed, the money cannot be recovered back.

The only importance of the distinction between the two forms is that it influences the succession to the stridhana property. If the marriage is in the approved form, *i.e.*, the Brahma form, the stridhana of a woman so married will devolve, in default of her children, to her husband and *his* sapindas, whereas in the Asura or the unapproved form it goes to her relations in *her* father's house, such as her brother, sister, mother, etc. [*vide* § 118 (3).]

Besides the Brahma and the Asura forms, another old form, *viz.*, the Gandharva marriage is said still to survive in certain parts. But the Allahabad and Madras High Courts have held that it has become obsolete. The peculiarity of a marriage in this form is the complete absence of any ceremony, being lawful only in the warrior tribes (48 Mad. 1 ; 3 All. 738).

The Rakshasa form (another of the old eight forms of marriage), *viz.*, the seizure of a maiden by force from her house, is at the present day practised among certain classes of Gonds of Berar and of Betul (A. I. R. 1927 Nag. 279). A sword marriage is an institution peculiar to the Kshatriyas and it is not common in persons of other castes. Hence the sword wives of the Tanjore Raja's family (Maharathas) have the status not of married wives but of permanent concubines (*Maharaja of Kolhapur v. Sundaram*, 48 Mad. 1). Among the Sudras a marriage in the *Katar* form (in which the bride is given to the bridegroom's sword or dagger in place of the bridegroom) is not a valid marriage in the absence of proof that the ordinary ceremonies of a Hindu marriage were performed and the issue of such a connection is not legitimate (36 Bom. L. R. 262, P. C.).

§ 10. Guardianship in marriage. *The right to give a girl in marriage belongs to the following persons in order, *provided they are of sound mind* :—

- (1) the father,
- (2) the paternal grandfather,

* Enumerate in order of preference the persons who are entitled to dispose of a girl in marriage. What is the legal effect of a marriage without the consent of a lawful guardian? (April, 1938 and 1941.)

- (3) the brother,
- (4) other paternal relations in order of proximity, and
- (5) the mother.

After the mother, under the Mitakshara law, the right belongs to the maternal grandfather, the maternal uncle and other maternal relations in the order of proximity. Under the Daya-bhaga law, the maternal grandfather and the maternal uncle come before the mother. There are no rules as to who may give a boy in marriage, as the Shastras do not contemplate the marriage of a male before he has attained puberty.

Nature of the right. Under Hindu law, as in most other systems of law, the right of a father to arrange for the marriage of his children is personal to him. He cannot delegate it to another person except by making a testamentary provision under certain conditions. He cannot in his lifetime assign it so as to substitute another person in his place. Indeed the power which the father possesses is in reality not a right strictly so called. It is a duty which he owes to the child and which, from the very nature of his relationship, he is peculiarly fitted to perform to the benefit of the latter. In discharging this duty, he is to act in a manner which is most conducive to the interest of the child (A. I. R. 1930 Lah. 566).

The consent of a guardian in marriage is not regarded as an absolute necessity, and on the basis of the doctrine of *factum valet* (*vide* § 40), a rule has been established that *a marriage, which is duly solemnised and is otherwise valid, is not rendered invalid, merely because it was brought about without the consent of the guardian in marriage* (*Khushalchand v. Bai Mani*, 1 Bom. 247). Thus, where the father is alive and otherwise capable of giving in marriage, the Court will not declare invalid a marriage properly solemnised by the mother without the father's consent. It is only when the *element of force or fraud is present* that a Court will interfere and declare a marriage void (*Mulchand v. Budhia*, 22 Bom. 812). But where a marriage is not actually celebrated, but is still in the stage of a contract for marriage, the Court may grant an injunction at the instance of the guardian for marriage to restrain the marriage (12 Bom. 480). Another principle is that when the person entitled to give the minor in

marriage is absent at the time when the girl ought to be given, or where he neglects or refuses to obtain a suitable husband for her, the person next entitled to give her in marriage can do so. Thus, where the father has deserted his wife and daughter, the mother can give the daughter in marriage without the consent of the father (*Khushalchand's case*).

The mother has been postponed to paternal relations because she cannot perform the ceremonies essential to a marriage. But she can select a bridegroom for her daughter, as she is the legal guardian of her daughter after her husband's death (*vide* Ch. IV).

§ 11. *Ceremonies necessary for marriage.* In order to constitute a lawful marriage among the Hindus, it is essential that certain nuptial rites should be performed ; otherwise the marriage is only a Gandharva marriage or a marriage importing an amorous connection founded upon reciprocal desire, *i.e.*, a marriage in a form which has become obsolete (48 Mad 1).

* The texts of Hindu law lay down the rule that the ceremonies of Homa and Saptapadi are necessary among the twice-born classes (*vide*, 38 Bom. L. R. 77). The ceremony of Homa consists in making oblations to the fire, and the ceremony of Saptapadi consists in the bride and the bridegroom jointly walking seven steps round the consecrated fire. *When the seventh step is taken the marriage becomes irrevocably complete ; till then, it is imperfect and revocable* (*Chunilal v. Surayam*, 33 Bom. 433). Of these ceremonies, at least, the Saptapadi is essential in the case of a marriage performed according to the orthodox rites. The ceremony of Vivaha Homa is also usually performed, but the non-performance of Vivaha Homa does not invalidate a marriage, if otherwise completed. It is now settled, however, that *if by caste usage any other form is considered as constituting a marriage, the adoption of that form with the intention of thereby completing the marriage union is sufficient* (33 Mad. 342 ; 1 Rang. 129). Where a marriage has been properly performed, consummation is not necessary to make it complete (10 Bom. 301). In the case of the remarriage of a widow, no ceremony is necessary. In the

* What ceremonies are absolutely essential for the validity of a marriage under Hindu law ? (Oct., 1938 and 1941 and April, 1943.)

case of a marriage under the Special Marriage Act as amended by the Act of 1923, the ceremonies are not necessary.

When once celebrated, the marriage cannot be dissolved, for it creates a religious tie which once tied cannot be untied. The marriage cannot be dissolved, even if it has been irregularly performed. There is a presumption that a marriage performed in fact is a marriage in law. There is also a presumption that if some of the ceremonies usually observed in such occasions have been performed, they have been duly completed (*Appibai v. Khimji*, 38 Bom. L. R. 77).

A fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with the knowledge of its nature, and with the clear and distinct intention of entering into the marriage, unless one of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. A marriage may also be invalid if the girl is abducted by fraud or force and married against her wish or that of her guardian. The test of validity is whether there is real consent to the marriage (*Appibai v. Khimji*, 38 Bom. L. R. 77). Where there were no threats or duress from either party to the marriage and the parties were shown to have given their consent to the marriage, it was *held* that the allegations of the husband that the wife, though really of a *khatri* caste and a *naikin* or dancing girl by profession, who had been previously in the keeping, from time to time, of several persons as mistress, had induced him to marry her by suppressing from him these facts and by misrepresenting to him that she was a widow, and a Brahmin by caste and a person of good character, would not invalidate the marriage, which was duly celebrated, even if these allegations of misrepresentation were true (*vide supra*).

A betrothal in Hindu law is a promise to give a girl in marriage and its form is that of a promise by the father or guardian of the girl in favour of the bride-groom and/or the bride-groom's father or guardian. No ceremonies are essential to the validity of a betrothal as they are in the case of a marriage. A betrothal agreement cannot be specifically enforced, and in case of its breach only a money award for damages can be made (7 B. H. C. R. 122; 11 Bom. 412; 21 Bom. 231; 42 Bom. 499).

§ 12. **Essentials of a valid marriage.** Besides the ceremony, if any, which has been regarded as essential by the caste, (1) the parties to every marriage must not be within the prohibited degree of relationship, and (2) in the case of Dwijas, the parties must ordinarily belong to the same caste.

Except as varied by custom, the prohibited degree among the Dwijas (*vide infra*) is determined by requiring that the parties to a marriage must not be *Sapindas*, *Sagotras* or *Samanapravaras*. As the Sudras have no *gotras* or *pravaras*, the only restriction among them with regard to prohibited relationship is that they must not be *Sapindas*.

* According to the Mitakshara, *Sapindas* are the persons who have in them particles of the body of the same ancestor; according to the Dayabhaga, *Sapindas* are persons connected by the offering of a funeral cake. According to the Mitakshara, all those *Sapindas* cannot intermarry, who have descended from a common ancestor, and being traced on the father's side are not beyond the seventh degree, or on the mother's side not beyond the fifth degree, both the ancestor and the person in question being counted as one degree.

The term *Sagotra* is applied to all those who are descended from a common original sage, who gives the descendants their *gotra* or *family name*.

The *Pravaras* are the illustrious sages who contribute to the credit of a particular *gotra*.

According to the rules of Hindu law, a man cannot marry (1) a female descendant within seven degrees from his father or any of his six immediate male ancestors. He is likewise incapable of marrying (2) a girl who is within five degrees from his maternal grandfather or any of his four paternal ancestors. The prohibition extends to the ascendants of (3) pitribandhu (*vide* Sec. 98 below) and (4) matribandhus (Sec. 98 below) as well. The bride must not be a descendant within seven degrees of the bridegroom's pitribandhus or any of the latter's six male ancestors. She must not also be a descendant within five degrees of the bridegroom's matribandhus or any of the latter's four male ancestors. In counting the seven or five degrees, the ancestor and the girl in question must each be counted as one degree.

* What is meant by prohibited degrees of relationship? Give illustration. (Oct. 1938; April, 1941.) Explain *gotra* and *pravara*. (April, 1941.)

There are two exceptions to the above rules of prohibited degrees :-

(A) The *trigotra* (three gotras) rule which sanctions a marriage even with a girl within the prohibited degrees, if she is removed from the bridegroom by three gotras. In computing the gotras for the purpose of applying the *trigotra* rule, the gotra of the bridegroom should be excluded. The second gotra must differ from the first and the third from the second. If the second differs from the first, the fact that the third is a repetition of the first would not matter, and the interval of three gotras would be established. (B) The second exception is that when a fit match is not otherwise favourable the kshatriya in all forms of marriage and the other classes in the Asura or other inferior form of marriage may marry within the prohibited degrees, provided they do not marry within the fifth degree from the father's side and the third degree on the mother's side (A. I. R. 1942 Cal 458)

Another requirement of a valid marriage under Hindu law is that the parties must belong to the same caste, though they may be members of different sects or sub-divisions of the same caste

Inter-caste marriage.

(*Appibai's case*). A man and a woman belonging to separate sub-castes of a twice-born class can lawfully intermarry (*Kshitish Chandra v. Emperor*, A. I. R. 1937 Cal. 214). "The Shastras dealing with the Hindu law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same *varna* (caste); and neither any decided case nor any general principle can be invoked which would warrant such a prohibition" (*per* Sir Shadi Lal in *Gopi Krishna v. Jaggio*, 1936, 58 All. 397, P.C.). Hindu society is divided into two main groups, (1) the Dwijas or the twice-born classes, and (2) the Sudras or the servile people. The division is very important because the law applicable to the two groups often materially differs. The Dwijas include the first three castes of the fourfold caste division of the Hindus, *viz.*, the Brahmins, the Kshatriyas and the Vaishyas. In the point of superiority they rank in the order in which they are mentioned above, and the Sudras rank below all of them.

* Inter-caste marriages were frequent before the caste system assumed an inflexible form, and even when it assumed an inflexi-

* Explain "Anuloma" and "Pratiloma" marriages, and discuss their validity or otherwise under Hindu law (April, 1929.)

What is Anuloma marriage? What are the rights of inheritance of a son born of Anuloma marriage? (April, 1934 and 1943)

ble form, they were customary. Thus the male members of a higher caste could take a wife from any of the lower castes. Such a marriage was called "*Anuloma*" (literally, born with the hair or grain, i.e., in due order) or hypergamous marriage. The offspring of such a marriage did not get the caste of the father nor of the mother, but belonged to an intermediate caste, higher than that of the mother and lower than that of the father.

Anuloma marriages, however, became obsolete, and this has led to a conflict of decisions. The Allahabad High Court has held that Anuloma marriage is invalid (28 All. 458). The same view is taken by the Madras High Court in a recent case, wherein it has been held that Anuloma marriage, being obsolete, is invalid under Hindu law in the absence of a custom or enactment to the contrary (*Subbaramayya v. Venkatasubbamma*, A. I. R. 1941 Mad. 513). On the other hand, the Bombay High Court recognises Anuloma marriages as valid. The marriage of a Vaishya with the illegitimate daughter of a Vaishya, born of a Sudra woman, has been upheld (*Gulab v. Jivanlal*, 24 Bom. L. R. 5). This case was followed by the same High Court, and it was held that the marriage of a Brahmin male with a Dharala (Sudra) woman is an *Anuloma* marriage and is valid. A son born of such a marriage is legitimate and is entitled to inherit a one-tenth share in the estate of his father as well as in that of his uncle (*Natha v. Mehta Chhotalal*, 55 Bom. 1). This latter proposition was laid down on the strength of Sanskrit texts which lay down that in the case of a division of the property of a Brahmin having sons by wives of different castes, 4 shares should go to the son by a Brahmini, 3 to the son by a Kshatriyani, 2 to the son by a Vaishya and 1 to the son by a Sudra, and in no case, not even where there are no other sons, more than a tenth part should be given to the son by a Sudra wife, the rest going to distant heirs. This rule does not apply to the sons of a Brahmin by a Kshatriya or a Vaishya woman; and under the Mitakshara, such sons would inherit the whole estate of their father in the absence of the sons of the same class.

But the converse of the *anuloma marriage*, i.e., the woman belonging to a caste higher than that of the husband, is illegal. Such a marriage is termed *Pratiloma*. Both the Bombay and Allahabad High Courts have declared invalid the marriage of a Brahmin female with a Kshatriya or Sudra male (2 Bom L. R. 128;

48 All. 670). Where a Brahmin woman marries a Sudra, the marriage being void, the woman is not entitled to maintenance (*Bai Kashi v. Jamnadas*, 14 Bom. L. R. 547). Any relationship between Sudra male and a Brahmin female, whether it purports to be a relationship by so-called marriage or a state of concubinage, is not recognised by Hindu law (*Ramachandra v. Hanman-naik*, 37 Bom. L. R. 920). A son born of such a relationship is not a *dasiputra* (vide § 13 below), and cannot inherit the estate or his putative father as an illegitimate son (*ibid*).

Among the Sudras inter-marriages are allowed between the sub-divisions of the same caste, unless a special custom or usage is proved to the contrary (13 M. I. A. 141 ; 10 Lah. 372). The illegitimate children of Hindus can inter-marry, as they are regarded as Sudras. Non-Hindus converted to Hinduism are regarded as Sudras for the purposes of marriage. Hence, a marriage between a Sudra man and a Christian woman converted to Hinduism is valid, if it complies with the other requirements of Hindu law (*Muthusami v. Masilamani*, 33 Mad. 342).

Without conversion, a marriage may not be possible under Hindu law between a Hindu and a non-Hindu. But it may be legal if it is contracted in a place where the law allows such a marriage. So a Hindu may validly marry a Christian woman in England as the law there does not prohibit a marriage between a Christian and a non-Christian. There can be no valid marriage between a Hindu and a Burmese Buddhist, except under the Special Marriage Act.

* Inter-caste marriages, whether of Anuloma or Pratiloma type, are now validated by special legislation if they fall within their provisions. These special acts are (1) Special Marriage (Amendment) Act, 1923, and (2) the Arya Marriage Validation Act, 1937. The Special Marriage (Amendment) Act of 1923 enables persons professing the Hindu, Buddhist, Sikh or Jain religion to celebrate a marriage before the Registrar. The only restrictions to such a marriage are :—

(1) Neither party must, at the time of the marriage, have a husband or wife living.

* Within what limits and under what disabilities are marriages between persons belonging to different castes allowed by modern Hindu law and legislative enactments? (Oct., 1927.)

Discuss the position of intercaste marriages in Hindu law. To what extent is it affected by the Special Marriage (Amendment) Act, 1923 and the Arya Marriage Validation Act, 1937? (April, 1940.)

(2) The man must have completed the age of 18 years and the woman the age of 14 years.

(3) Each party must, if he or she has not attained the age of 21 years, have obtained the consent of his or her father or guardian in marriage

(4) The parties must not be related to each other in any degree of consanguinity or affinity which would, according to the law to which either of them is subject, render the marriage between them illegal.

A person marrying under this Act is subject to the following *disabilities* :—

(1) If he is a member of an undivided family, the marriage shall effect his severance from the family, but he will not lose his rights and property, and his right of succession

(2) No such person shall have the right of adoption, but his father shall, if he has no other living son, have the right to adopt another son under the law to which he is subject.

(3) Succession to the property of parties to such a marriage and their issue shall be governed by the Indian Succession Act, and not by Hindu law.

(4) The Hindu husband marrying under this Act loses his right of polygamy under general Hindu law and cannot contract a second marriage in the life time of his wife, unless they are separated by a divorce. A right of divorce under Divorce Act, 1869, accrues to parties contracting a marriage under this Act

The Arya Marriage Validation Act, 1937, was passed, as its preamble shows, to recognize and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists. The Arya Samajists are monotheists. This faith was founded by Pandit Dayanand Saraswati, who opposed idolatory and caste, and advocated female education and the remarriage of widows. The enacting part of the Act is Section 2 which runs as follows: "Notwithstanding any provision of Hindu law, usage or custom to the contrary no marriage contracted before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed to have been invalid by reason only of the fact that the parties at any time belonged to different castes or sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to the religion other than Hinduism."

(1) Thus, the Act is limited in its operation only to a marriage when both the parties to it are Arya Samajists at the time of the marriage.

(2) It removes only the impediment to the marriage on the ground that the parties did not originally belong to the same caste or were not Hindus by birth. In other respects it seems that the marriage

must satisfy the requirements of Hindu law. (3) The Act is retrospective. (4) Unlike the Special Marriage Act, this Act does not enact any special disability, and the parties would remain subject to Hindu law in all other respects. None of the disabilities mentioned above as attaching to the parties under the Special Marriage Act attaches to the parties to whom this Act applies.

§ 13. Avaruddha Stree. Hindu law recognises a sort of permanent concubinage in what is known as the *Avaruddha Stree*.* The position in Hindu households of permanently kept concubines, who often reside in the same building, is very analogous to the married wife (48 Mad. 1). Such a mistress has a status in Hindu society, and her sons, who are called *Dasiputras*, are entitled to maintenance, and among the Sudras, also to rights of inheritance and a share on partition.

An Avaruddha Stree or Dasi is a woman, who (1) being a Hindu, is (2) in the continuous and exclusive keeping of a Hindu, (3) provided the connection is neither adulterous nor incestuous.

(1) Just as the paramour must be a Hindu in the case of an Avaruddha Stree, it is also necessary that the concubine herself must belong to one of the four castes and be a Hindu (*Haidari v. Narain Singh*, 1 Luck. 184). A kept mistress of any other faith is not a Dasi, nor her son a Dasiputra. Thus, it has been held that the illegitimate son of a Hindu by a Muslim or a Christian mistress is not an heir (*Sitaram v. Ganpat*, 25 Bom. L. R. 429; 27 Mad. 13). According to a recent decision of the Bombay High Court, it is further essential that the mistress should be a low caste Hindu. "The term 'dasi' is generally applied to a low caste woman living in an illegal connection with another person... The view of the Shastras is that any relationship between a Sudra male and a Brahmin female, whether it purports to be a relationship by so-called marriage or a state of concubinage, is not recognised by Hindu law." It was held that a son born of a Sudra male and his Brahmin concubine is not a *dasiputra* and cannot inherit to the estate of his father as an illegitimate son (*Ramachandra v. Hanmannaik*, 37 Bom. L. R. 920).

* Within what limits is concubinage recognised by Hindu law? (Oct., 1929.)

Discuss the legal status of a mistress under Hindu law. (April, 1929.)

Write short note on : Avaruddha Stree, (Oct., 1937; April, 1942)

(2) This second limitation has been imposed to secure due evidence of the paternity of a child. But there is no limitation as to the period for which the connection must last, provided the woman was in the *sole* keeping of her paramour and *the connection lasted till the death of the paramour* (*Tukaram v. Dinkar*, 33 Bom. L. R. 289). Thus even cohabitation for a period of 5 years or 3 years has been held to be sufficient (50 Bom. 604, P. C. ; 39 Mad. 136).

(3) This limitation as to the connection being neither adulterous nor incestuous has been imposed on general grounds of morality. The decisions, however, do not go so far as to lay down that the connection from its very inception should be free from the taint of adultery or illegality. A connection, originating in adultery, the husband of the woman being then alive, ceases to be adulterous on the death of the husband, and a son conceived thereafter would not be a fruit of adulterous intercourse and hence would be entitled to his rights as a Dasiputra. As for the concubine herself, it has been held by the Bombay High Court that a kept mistress whose husband was alive is not an Avaruddha Stree and consequently is not entitled to maintenance (*Anandilal v. Chandrabai*, 48 Bom. 203 ; see, however, Mayne, 9th edition, Para 450 ; 1 Bom. 97 ; A. I R. 1929 Nag 167). If the connection is neither adulterous nor incestuous, it is not a further condition that a marriage between the parties should be lawful (*Soundarajan v. Arunachalam*, 39 Mad. 136). The concubine need not be an unmarried woman ; she may be a widow or even a common prostitute (*Rahi v. Govind*, 1 Bom. 97 ; 40 Bom 369 ; 39 Mad. 136).

The word "Dasi" originally meant a female slave. It was, therefore, at one time held by the Calcutta High Court, that since the abolition of slavery in 1843, there could be no such persons as a Dasiputra, and consequently, an illegitimate son of a Sudra was not entitled to any share of the inheritance (*Narain v. Rakhal*, 1 Cal. 1). But a Full Bench of the same High Court has subsequently adopted the view of the other High Courts, that though the primary meaning of "Dasi" is a female slave, it includes also a woman in the exclusive and continuous keeping of a man (*Rajani Nath v. Nilan Chandra*, 48 Cal. 643).

The Bombay and Lucknow Courts sought to impose a further limitation, that the woman in order to be Avaruddha Stree must live as a member of her paramour's family (47 Bom. 401 ; 1 Luck. 184).

But the Privy Council, on appeal from the Bombay case, has held that as slavery has been abolished, common residence is not now necessary, whatever may have been the case when the concubine was a slave of the household (*Bai Nagubai v. Bai Monghibai*, 50 Bom. 604, P. C.) It is also not necessary to show that the concubine was recognised by the family of her paramour or his relationship with her was known to the family (36 Bom. L. R. 61)

Illegitimate children. The English Common Law doctrine of treating an illegitimate son as *filius nulus* is not applicable to the Hindu (30 All. 508). Illegitimacy in the sense in which it is now understood was not at all recognised under the ancient Hindu law with its numerous varieties of marriages and still more numerous varieties of sons (vide § 19 below); and the question of illegitimacy could come in only if there was a legal impediment to marriage on account of prohibited degrees of relationship, or there was an infringement of the rule of caste by a woman of a higher caste marrying a man of a lower caste. But the position has been considerably modified in view of the fact that many forms of marriages and varieties of sons are now obsolete, in the sense that unless allowed by custom, they are not recognised by law. For example, a son born of parents married in the Gandharva form of marriage, though a legitimate son under ancient Hindu law, would have now to be deemed to be illegitimate

In the case of the father, where there is no legal marriage there is no presumption of paternity. Accordingly there is an amount of uncertainty as to the parentage of illegitimate children. But the birth of a child from the womb of its mother can be ascertained with certainty. It would, therefore, seem that if an illegitimate child does not succeed to the estate of its father, it does not necessarily follow that the child should not succeed to the estate of its mother. There are mutual rights of inheritance between a Hindu mother and her illegitimate children. Thus, the illegitimate children are entitled to inherit their mother's stridhana (21 Mad. 40, 45 Bom. 557); and a mother has a right of inheritance to her illegitimate son (*Jagannath Gir*, 57 Mad. 85). Similarly, illegitimate children have rights in the estate of their putative father, when the paternity is established as in the case of a Dasiputra. A Dasiputra has a right of maintenance generally, and a right of inheritance and a share in partition when the putative father is a Sudra [vide § 50 (7) : § 79, § 97 (2)]

§ 14. Presumption of marriage. A marriage may be presumed from continuous cohabitation, conduct and repute. The law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years, and this presumption of law can be rebutted only by strong, distinct and conclusive evidence. Where B. and J. had lived together for a continuous period of 15 years and the

first birth-day anniversary of their boy was celebrated on a scale quite unusual in the case of an illegitimate son, and where B. had treated J. as his wife and described her in the documents executed by him as *Mahadevi* (signifying, a married wife), and treated the boy as his son, it was *held*, that the marriage of J. with B. was established and the boy was J.'s legitimate son (A. I. R. 1933 P. C. 20). Though the presumption is in favour of marriage, it is otherwise if the connection is known to have been in its origin illicit, or marriage between the parties is otherwise not lawful (*Indar Singh v. Thakur Singh*, 2 Lah. 207). The presumption has no application where it is not possible to have a legal marriage between the parties. Thus, where before the passing of the Hindu Widows' Remarriage Act and where there was no proof of a custom of widow remarriage in the community, a Hindu male was cohabiting with a Hindu widow, it was held that the union was irregular, and that it could not be turned into a marriage by any amount of ceremonies, or by evidence of length of cohabitation and of conduct and repute, nor was it validated by the subsequent enactment of the Hindu Widows' Remarriage Act (A. I. R. 1942 All. 175).

So also, when it is established that there has been marriage in fact, it will be presumed that it is valid in law, especially where a long period has elapsed since its celebration (13 M. I. A. 158). But in the case of a suit for restitution of conjugal rights, the Courts require a stronger proof of the performance of a marriage and its validity (28 Cal. 37).

§ 15. Conversion from Hinduism and its effect on marriage. An apostate from Hinduism is not absolved from all the civil obligations, and, so far as the matrimonial bond is concerned, to hold otherwise would be contrary to the spirit of the law which regards marriage as indissoluble. After the passing of the Native Converts' Marriage Dissolution Act, the law has been modified so far as Hindu converts to Christianity are concerned. This Act lays down that where a Hindu husband or wife adopts the Christian religion, the marriage can be dissolved by taking proceedings under the Act, if the wife or husband of the convert refuses to cohabit with such convert on the ground of such conversion. It must be noted that the Act does not apply to conversion to a religion other than Christianity, and also that

conversion does not *ipso facto* dissolve the marriage without any proceeding in Court (18 Cal. 252).

§ 16. **Divorce and remarriage.** Divorce is unknown to general Hindu law. The general rule of Hindu law is that the marriage tie is indissoluble and there is no such thing as divorce. (A. I. R. 1933 Bom. 21). Hence a Hindu marriage cannot be dissolved, except (1) under the Native Converts' Marriage Dissolution Act as shown above, or (2) on the ground of custom.

The custom of divorce exists among the lower castes. The cases in which a wife may remarry (called, *Pat* by the Marathas and *Natra* in Gujarat) as stated by Mr. Steele are (1) if the husband is proved to be impotent; or (2) if the parties continually quarrel; or (3) if the marriage were irregularly concluded; or (4) if, by mutual consent, the husband gives the wife a *chhor chitti* (writing of divorcement); or (5) if he has been absent and unheard of for twelve years. Disputes concerning this subject are generally settled by *punchayets* or caste assemblies. There has been a conflict of opinion between the Madras and the Bombay High Courts as regards the validity of a custom of divorce. The Madras High Court has held that there is nothing immoral in a custom by which divorce and remarriage are permissible by mutual agreement on repayment by one party to the other of the expenses of the original marriage (17 Mad. 479). But the Bombay High Court has held as immoral a custom which allowed a woman to contract a *Natra* marriage on payment of a certain sum to the caste (*Narayan v. Laving*, 2 Bom. 140). And it has been doubted by the same Court whether the custom would be valid even if it allowed her to remarry with his consent (10 Bom. H. C. 381). The same Court has also refused to recognise the authority of the caste Panch to grant a divorce (19 Bom. L. R. 56).

The Divorce Act, 1869, contemplates a marriage on the Christian principle of a union of one man and one woman to the exclusion of all others; hence this Act cannot be invoked to dissolve a marriage which was primarily in the Hindu form. A. and B. were married according to the Hindu rites. The wife subsequently left her husband and lived in adultery with another person. Then, both the husband and the wife became Christians, the wife still continuing in adultery. It was *held* that the marriage which was

primarily in the Hindu form cannot be dissolved on the ground of adultery under sec. 9 of the Divorce Act (8 Bom. L. R. 856 ; 17 Mad. 253). The Calcutta High Court has differed from this view (18 Cal. 252).

After the passing of the Hindu Widows' Remarriage Act, re-marriage of widows is legalised. In the case of a widow remarriage validated by the Act, Section 6 of the Act requires for the remarriage in all circumstances the words and ceremonies enjoined for the first marriage. But where the re-marriage was recognised by a custom in the particular caste, Section 6 has no application, and it is sufficient if the conditions essential by custom to validate the remarriage are fulfilled (A. I. R. 1937 Sind. 42). Section 2 of the Acts lays down that on remarriage all the existing rights of a widow in her husband's property, whether by way of inheritance or maintenance, or by testamentary disposition, not expressly permitting her to remarry, shall cease and determine as if she had then died. The widow, therefore, would forfeit the estate vested in her from her former husband. But the Act does not affect any right or interest which had not vested in her at the time of her remarriage. Thus a widow can after her remarriage inherit the property of her son by her first husband, when the son dies after her remarriage (29 Bom. 91 ; A. I. R. 1925 Pat. 233). So also, she can succeed to the stridhana of her daughter by her former husband, where the daughter dies after her remarriage (26 Bom. L. R. 235). Again where the acquisition is not by one of the modes by which rights and interests are acquired by the widow as contemplated by Section 2 of the Act, there is no forfeiture, *e.g.*, a gift of immoveable property by the father-in-law (A. I. R. 1924 Mad. 600).

There is a conflict between the several Courts of India as to whether the Act applies to those communities wherein widow re-marriage was permitted by the custom of the community, even before the passing of the Act, though all are agreed that the Act does apply to those communities wherein remarriage is not permissible by custom of the caste and is valid only under the Act. The Bombay, Calcutta, Madras, and Patna High Courts have held that the Act applies even to the communities where widow-

remarriage was permissible by custom even before the passing of the Act and the forfeiture enacted in Section 2 of the Act operates in their case as well. "Any custom repugnant to the enactment will be held to have been swept away thereby" (22 Bom. 321, F. B.; *vide* also, 1 Mad. 226; 50 Cal. 727; 1 Pat. 706). While the Allahabad, Lucknow, Punjab and Oudh Courts have held that if a Hindu widow is allowed to remarry by the custom of her caste, there is no need to have recourse to the Act for the validity of her remarriage, and, therefore, there is no forfeiture of her rights if she remarries, unless the custom itself enacts such forfeiture (55 All. 24; 3 Luck. 616; 12 L. J. 196; A. I. R. 1921 Oudh 233). But the practice of widow remarriage after 1856, *i.e.*, after the enactment of the Hindu Widows' Remarriage Act, in any section of the Hindus may well be referable to the provisions of the Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. Unless, therefore, it is shown that the practice of re-marriage is in pursuance of an ancient custom and not under the Act, the remarriage of a widow cannot be held to be under the custom of the caste (A. I. R. 1937 All. 230 and 343). The Allahabad High Court has further held that when a Hindu widow becomes a Muslim and then remarries, the Act does not apply, as she had ceased to be a Hindu at the time of her remarriage (35 All. 466). The Bombay, Calcutta, Madras and Patna High Courts have taken a contrary view on this point (37 Bom. L. R. 150; 19 Cal. 289; 41 Mad. 1078; 1 Pat. 706).

§ 17. **Effects of marriage.** According to Hindu law, the husband and wife become one person in law by marriage. Many legal consequences followed from this *unity of person*, but these are now confined to religious purposes and do not extend to civil matters. The wife can hold separate property, she may enter into a contract with any person and even with her husband, and may sue or be sued in her own name. Under the Indian Penal Code, the husband or the wife does not become guilty of harbouring an offender if the one screens the other.

The following rights or liabilities arise out of a Hindu marriage :—

- (1) The wife acquires the domicile of her husband.

(2) the husband acquires the right of guardianship over his minor wife, even in preference to her parents.

(3) The wife is bound to live with her husband and to submit herself to his authority.

(4) The husband is bound to live with his wife and to maintain her.

(5) Parties acquire mutual rights of inheritance.

Guardianship of a minor wife. According to Hindu law, a husband is the legal guardian of his wife's person and property, whether the marriage is consummated or not. A wife is bound to live wherever the husband lives and such a duty is not only a moral duty but a rule of Hindu law. But a general *custom* by which a wife is kept in the parental house till she attains maturity is valid (24 Mad. 255). The Bombay High Court has also held that for a *good cause*, the husband may be refused the custody of his minor wife. Thus the fact that a girl is not mature was held to be a good ground for refusing the custody of the girl to her husband (*Navnital v. Purshottamdas*, 50 Bom. 268). In the absence of such a custom or a justifying cause, the husband's marital control over his wife is so complete that even a father cannot take away his married daughter under sixteen years of age from her husband's custody without his permission (17 Cal 298). An *ante nuptial* contract by the husband with his wife to the effect that he would never be at liberty to remove her from her parental abode is not binding, as such an agreement is against public policy (28 Cal. 751). Even where the husband had failed to get the custody of his wife through a civil court on account of the wife not having attained maturity, but he took an opportunity of taking his wife into his own custody, it was held that he was not guilty of any criminal offence (A I R. 1943 Pat. 109).

After the death of the husband, the guardianship of his minor widow and the management of his property devolve on her husband's relations in preference to her own paternal relations (16 Cal. 584).

§ 18. Restitution of conjugal rights. On marriage, the husband is entitled as of right to the society of his wife and the wife to the society of her husband. Hence a cause of action

arises when one of the parties to the marriage withdraws from the society of the other, and a suit lies for the restitution of conjugal rights. A formal demand and refusal is not a condition precedent to such a suit in India.

The relief as to restitution of conjugal rights is discretionary with the Court. In a suit for restitution of conjugal rights, the Court must consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hand of the Court the relief which he or she seeks, and whether such a relief is not unreasonable in the particular case against the defendant (*Bai Jivi v. Narsingh*, 51 Bom. 329 ; A. I. R. 1938 Sind 233 ; A. I. R. 1940 Mad. 777).

A decree for restitution can be refused only on the grounds which would justify the wife in refusing to live with her husband. The Court would refuse to grant the decree in the following cases: (1) legal cruelty, *i.e.*, actual violence of such a character as to endanger personal health or safety, or to create a reasonable apprehension of it (46 Mad 391 ; 1 Bom. 146); (2) the husband keeping a mistress of low caste in the same house (34 Cal. 971); (3) conversion to an alien faith (8 All 78); (4) a disease like leprosy or syphilis (45 Mad. 812) ; but impotency of the husband is held not to be a bar to a suit by him for restitution of conjugal rights ; (5) adultery of the wife, when the suit is brought by her; (6) if the suit is brought *mala fide*, *e.g.*, where the husband has filed the suit for an ulterior purpose, as where, being indebted to the wife who had obtained a decree against him, he sued for restitution with a view to coerce her into relinquishing her claim (51 Bom. 329). The Court may grant a conditional decree for restitution in a proper case. *e.g.*, requiring an outcaste husband to get himself restored to the caste before he can enjoy the fruits of the decree (31 Bom. 366).

CHAPTER III.

ADOPTION.

§ 19. **Nature.** In India, at one time, twelve different kinds of sons were recognised. But all except three have now become obsolete. These three are (1) the Aurasa or the legitimate son, (2) the Dattaka or the adopted son and (3) the Kritrima or the son made. The latter two are different kinds of adopted sons.

The Dattaka form is the ordinary mode of adoption and is in use all over India. The Kritrima form is prevalent in Mithila and the adjoining districts. As understood in Hindu law, adoption is itself a *second birth* proceeding upon the fiction of law that the adopted son is *born again* into the adoptive family. Hence the benefits secured by an adopted son are two-fold, religious and secular. The religious benefit consists in the adopted son offering the funeral cake, water and solemn rites to the adoptive father and his ancestors, while the secular benefit consists in his celebrating the name and duly perpetuating the lineage of his adoptive father.

The foundation of the doctrine of adoption under Hindu law is the religious side of it, the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary rites. One of the principal obligations of a son is to deliver his dead father from the region called *put*, the region of the nether world where, according to Hindu theology, the soul of a dead man goes for purification. This the son does by performing his father's *śraddha*. The essential ceremony in *śraddha* is the offering of *pindas* (funeral cakes) with the recitation of *mantras* (A. I. R. 1943 Cal. 613).

§ 20. **Conditions of a valid adoption.*** The conditions essential for a valid adoption are—

- (1) the person adopting must be capable of adopting ;
- (2) the person giving in adoption must be capable of giving in adoption ;

* State the requirements of a valid adoption. (Oct., 1941.)

(3) the person adopted must be capable of being taken in adoption ;

(4) valid gift and acceptance ; and

(5) the performance of such ceremonies as are essential.

§ 21. Who may adopt. Every *male* Hindu has a right to adopt if he (1) has no living natural or adopted son, grandson or great grandson, (2) has reached the age of discretion and (3) is of sound mind. The right is subject to two exceptions. Firstly, if there be any caste or family custom prohibiting adoption, it will be given effect to by the Courts. Secondly, the right to adopt is subject to any law for the time being in force which prohibits or restricts adoption, *e.g.*, a Hindu who has married under the Special Marriage Act, or a eunuch registered under the Criminal Tribes Act, cannot adopt at all. Persons who are wards of a Court are prohibited from adopting without the consent of the Court.

(1) Even though a person may have a son, he will be entitled to adopt if the son be *civilly* dead, *e.g.*, if he has turned a *sanyasi* or *fakir* completely renouncing the world. If the son is married under the Special Marriage Act, his father, if he has no other living son, can make an adoption. If the son is *missing* and *has not been heard of for seven years*, the *missing* son will be presumed to be dead under the conditions laid down in section 108 of the Indian Evidence Act and the father can then make a valid adoption. *But the fact that the son is disqualified from inheriting, owing to any physical defect (*vide* Ch. XI), does not give the father a right to adopt (*Bharmappa v. Ujjangauda*, 46 Bom. 455). The Madras High Court has, however, held that the existence of a son, who is not only disqualified from inheritance but is also incompetent to perform obsequial and other ceremonies, is no bar to an adoption by his father. The reasoning of the Madras High Court is, that as the main purpose or object of adoption is to secure the due performance of obsequial ceremonies and oblations given in *śraddha* and other ceremonies for

* What are the requirements of a valid adoption under the Hindu law as applied to the Bombay Presidency? (April, 1939.)

Is the following adoption valid : By a Hindu having a grandson, who is subject to the defect of dumbness from his birth? (March, 1922.)

the benefit of the adopter's soul, a son incapable of performing these ceremonies can bear only the semblance of a son, whose existence can be ignored and an adoption made (*Nagammal v. Sankarappa*, 54 Mad. 576, both the sons suffering from a virulent and incurable type of leprosy). Existence of an illegitimate son is no bar to an adoption (48 Mad. 1). In a recent case, the Bombay High Court reaffirmed its earlier decision, and held that a person having a natural born son, who was disqualified from inheriting on account of congenital and incurable idiocy, was not "sonless", and was consequently incompetent to adopt (42 Bom. L. R. 371). The existence of an invalidly adopted son is no bar to subsequent adoption of a second son (*Radha v. Dinkarrao*, 39 Bom. L. R. 147).

A person cannot make simultaneous adoption of two sons, or successive adoption of another while the son first adopted is living, both the adoptions in the case of the simultaneous, or the second adoption in the case of the successive adoptions, being void (19 I A 109).

(2) The Indian Majority Act does not apply to the Hindus in matters of adoption. So a Hindu, though a minor according to that Act, who has attained the age of discretion, can make a valid adoption (1 Cal. 289, P. C.). It has not been settled what the age of discretion is. The Hindu law books treat the age of majority and of discretion as convertible terms, and consider each period as attained on the completion of the 15th year in Bengal and of the 16th year in other provinces.

In a recent case, the Bombay High Court has held that an adoption by a youth or girl who has not completed the age of fifteen years is not necessarily invalid. What is required is the possession of the necessary understanding and discretion, and it is a question of fact to be determined on the evidence of each particular case. Hence, an adoption by a boy aged fourteen and a half years, who was found capable of understanding and did understand what an adoption was and what it meant, was treated as valid (*Kashinath v. Anant*, 1942, 44 Bom. L. R. 629).

(3) Unsoundness of mind, in order to disqualify a person from adoption, must exist at the time of adoption, rendering the person not capable of knowing the nature of the act. A lunatic can, therefore, adopt during lucid intervals.

The fact that the adopter is a bachelor, or a widower, or that his wife is pregnant to his knowledge, is immaterial. A man can adopt not only without consulting his wife, but even in spite of her opposition (49 Mad. 941)

After the passing of the Caste Disabilities Removal Act, degradation from caste, or loss of religion, would not deprive a person of his right to adopt.* But where a person not only

renounces Hinduism but also accepts another religion with a personal law attaching to it, such as Islam, he loses a right which

is alien to it. In a case where the parties were Parmar Rajputs (Girasias) of Dhandhuka, who were converted to Islam nearly four hundred years ago and had retained many Hindu customs of living, and were governed in matters of succession and inheritance by Hindu law, it was contended that the parties retained the Hindu law and custom of adoption as a part of their retention of Hindu law of succession and inheritance. But the Court negatived this contention, and held that adoption is not necessarily succession or inheritance; that Muslim law does not recognise adoption; and that, therefore, the presumption is that, as a necessary consequence of conversion to Islam, the law of adoption recognised by Hindu law and usage had been abandoned by the Parmar Rajputs; and that, therefore, those who allege that the law and usage in question had been retained must prove it (*Bai Manchhabai v. Bapuraj*, 35 Bom. 261). It is also difficult to see how a Hindu, who has become a Christian, can take a son in adoption. The Indian Succession Act, which governs the native Christians, does not make any provision for an adopted son, and hence, such a son would not inherit. In the case of members belonging to the twice-born castes, a person suffering from virulent leprosy would be incompetent to take a son in adoption, at any rate till he performs expiatory ceremonies prescribed by the Shastras (*Ramabai v. Harnabai*, 48 Bom. 363). In the case of the Sudras, leprosy is not a bar to making an adoption.

* B, a Hindu of Bombay Presidency, gave up his faith of Hinduism and embraced Islam. As he had no son, he adopted a son A. Thereafter B died. A, as an adopted son of B, claimed the full right of inheritance. Advise A in the matter. (April, 1933.)

§ 22. **Adoption by wife.** A wife or widow *can adopt only to her husband*; an adoption to herself, except where Kri-trima adoption is allowed, is invalid. An adoption to any other male is invalid, so that a mother cannot adopt to her son or a sister to her brother. A maiden cannot adopt at all.

A wife cannot adopt to her husband, except with his consent. This consent may be oral, but must always be express. As a lunatic cannot give his consent, the wife of the lunatic cannot validly adopt (*Ramkrishna v. Laxmunarayan*, 22 Bom. L R 1181).

§ 23. **Adoption by widow.** The power of a wife or widow to adopt is derived from a text of sage Vasistha which says, "*Nor let a woman give or accept a son unless with the assent of her lord.*" All the five schools of Hindu law accept this text as authoritative, but each interprets it differently :

(1) The Mithila school apparently takes this to mean that the assent of the husband must be given *at the time* of the adoption, and that, therefore, a widow cannot receive a son in adoption at all, according to the Dattaka form

(2) The Bengal and the Benares schools interpret the text as requiring an *express permission given by the husband in his lifetime, but capable of taking effect after his death*. So a widow can adopt in these schools only under an express authority from her husband

(3) The Mayukha and other authorities of the Bombay school explain the text away by saying that *it applies only to an adoption made in the husband's lifetime*, and is not to be taken to restrict the widow's power to do an act which the general law prescribes as beneficial to her husband's soul. In the absence of prohibition the husband's authority is presumed. Hence in the Bombay school, a widow has *in herself* power to adopt, subject only to such restriction, if any, as may have been imposed upon her by her husband (*Jagannath Rao*, 35 Bom L R 230-60 I A 49, P. C.).

* The text of Vasistha says : "Nor let a woman give or accept a son unless with the assent of her lord." How is this text interpreted by the different schools of Hindu law? (Oct., 1932)

(4) The Madras law is intermediate between the law of Bengal and that of Bombay. According to this school, the word *husband* in the text is used *in an illustrative and not an exhaustive sense*, and means the *guardian* of the widow for the time being. Hence want of authority from the husband can be supplied by the assent of his sapindas who are the widow's guardians after her husband's death.

A widow's power of adoption is co-extensive with that which her husband would have, if alive. A remarried widow cannot adopt to her first husband (23 Bom. L. R. 489). Minority in the case of a widow is no bar, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted. Thus, it was held, that, in the absence of any evidence that the particular girl in question had a special capacity to exercise independent judgment, the girl widow of 12½ years was incompetent to make a valid adoption (*Parvatava v. Fakirnaik*, 46 Bom. 207). In the case of an adoption by a minor Hindu widow, the conscience of the Court should be satisfied that she was acting as a free agent, and that she understood and was made to realise what difference it would make to her position from a temporal point of view if she made the adoption (*Mallangouda v. Dundapagouda*, 34 Bom. L. R. 1009).

*Unchastity of a widow is supposed to be a very great crime in Hindu law, and an unchaste Hindu widow cannot adopt even when specially authorised by her husband

Unchastity of widow. (5 Beng. L. R. 362). Unchastity deprives her of all religious efficacy (*Moniram v. Keri Kolitani*, 5 Cal. 775, P. C.) ; in adoption certain religious ceremonies have to be gone through in which such a woman would be unable to take part, and consequently, it has been held that a widow who has become unchaste, is living in concubinage and in a state of pregnancy resulting from such concubinage is incompetent to receive a boy in adoption (5 Beng. L. R. 362). She may do so after performing the prescribed penances which will expiate the sin (2 Borrdaile Reports 488). But to disqualify her from adoption on the ground of unchastity, it must be shown

* State to what extent a woman's right of adoption is affected by unchastity. (April, 1933.)

that she was living an immoral life at the time of adoption. Consequently, the fact that four years after her husband's death in 1914 the widow became the mistress of some person in itself would not mean she cannot make a valid adoption in 1928 (A. I. R. 1942 Mad. 379). In the case of the Sudras, among whom no religious ceremony is necessary, a widow's unchastity will be no bar to a valid adoption (5 Cal. 770), and so in a Bombay case such an adoption was held to be valid (*Basant v Mallappa*, 45 Bom. 459). A Hindu widow of a regenerate class made an adoption while she was living in unchastity. The adopted son belonged to the same gotra as his adoptive father. The performance of the ceremonies of adoption was delegated by the widow to others who performed them including the *datta homam*. It was held, that in the circumstances the unchastity of the widow did not render the adoption invalid (*Rama v. Gana*, 43 Bom. L. R. 920).

§ 24. Adoption under express authority. The question of authority to a widow to adopt is important in the Benares and the Bengal schools, where a widow can adopt only if she has an authority from her deceased husband. In the Madras Presidency, the existence of such an authority relieves the widow from the necessity of obtaining consent of her husband's sapindas or coparceners to the adoption; in the absence of the authority, however, she can make an adoption, provided she obtains such consent. In Bombay and the C. P., the widow has power to adopt without obtaining any such consent, even in the absence of an authority to adopt from the deceased husband; hence, the existence of an authority is material only for the purpose of determining the limitations and conditions, if any, that the husband may have imposed on the widow's power to adopt. In Mithila, as a widow, authority or no authority, cannot adopt at all in the Dattaka form, the question of authority is wholly immaterial.

The authority to adopt may be oral or in writing, and is revocable. If it is in writing, it must be registered, unless it is given under a will. As a minor cannot make a will, an authority contained in what purports to be a will of the minor requires registration like any other non-testamentary instrument (*Vijaya-ratnam v. Sudarsana*, 48 Mad. 641). An authority to adopt may be given by a Hindu who has attained the age of discretion (15

Bom. 565). The fact that he is a member of a joint family is no impediment.

The authority to adopt can only be given by the husband. No other relation can authorise a widow to adopt. Hence a son's will directing his mother to adopt in the event of his death, does not amount to an authority to the mother to adopt. The Madras High Court has, however, held that an adoption made by the mother under these circumstances may be validated on another ground, *viz.*, the consent, as evidenced by the direction in the will, of the son, who was the nearest sapinda of the mother, to adoption by her (*Annappurnamma v. Appayya*, 42 Mad. 620).

To whom authority can be given. An authority to adopt can be given only to a wife or to a widow, and not to any other person, nor to a widow jointly with another. Except in the case of co-widows, a joint authority given to the widow and another person is void, and no valid adoption can be made under it (*Anrilo Lal v. Surnomone*, 27 Cal 926). But a person may direct that his wife should *consult* a specified person in making the adoption; this direction, however, is not binding on her and she can adopt without consulting such person (18 Cal. 315). Where, however, the widow is directed *not to adopt without the consent* of a specified person *so as to make its exercise contingent upon such consent*, the direction would be binding and an adoption made without such consent is invalid (*Bal Gangadhar Tilak v. Shrinivas*, 39 Bom. 441, P. C.). Similarly, as regards an authority to adopt with the *consent* of a particular person (*e.g.*, 'with the permission of my father'), the obtaining of the consent was held as a condition precedent to the exercise of the authority, and an adoption without such consent was held invalid, even though it was impossible to obtain the consent because the person was dead (*Rajendra Prasad v. Gopal Prasad*, 32 Bom. L. R. 1588, P. C.).

In the case of co-widows, if the authority is given *severally*, the senior widow has a prior right to adopt, and the junior widow cannot make a valid adoption unless the senior widow refuses to do so (31 Cal. 582). A transfer by way of relinquishment of the right of adoption by a senior widow in favour of her junior widow is valid and would extinguish the senior widow's right to adopt (39 Bom. L. R. 1115). If the authority is given to one

only of several widows, the widow so authorized can adopt without referring to her co-widows. A *joint authority* to two widows cannot be exercised after the death of one of the widows so authorised (37 Mad. 199, P. C.). But a *joint authority to two widows is not invalid* and can be exercised by both, or by one with the concurrence of the other, during their joint lifetime. Where, therefore, under a joint authority, both the widows concurrently make the adoption, the adoption is not invalid, though the act of adoption should be deemed to be made by the senior widow only and to herself as the mother (*Tiruvingalaratnam v. Butchayya*, 52 Mad. 373). A deed of authority to adopt by M conferring the power of adoption authorised both the wives to adopt P, and if either of them was not willing to adopt him then the other was at liberty to do so. It was *held*, that the real intention of M was to give each of the wives primarily the power to adopt with the consent of the other and secondarily, if this consent was not received, to adopt against the will of the other, and that such an authority was valid (A. I. R. 1943 Mad. 319).

Construction of an authority. An authority given to a wife to adopt has to be strictly construed (*Chowdhry Pudum v. Koer Oodey Singh*, 16 Bom. L. R. 328, P. C.). The ordinary rule as to the construction of powers which prevails in England (as, for instance, that when a power has been given to be executed with the consent of a person, and that person dies before the power is executed, the power comes to an end) is generally applicable to the construction of an authority to adopt executed in India

Thus, where a testator executed a power in favour of his wife to adopt his step-brother to him, and "if there be an obstacle to take him in adoption according to the Shastras, then she may adopt any one else whom she wants *with the permission of my father*," it was *held*, that as there was a prohibition to the adoption of a step-brother in some of the Sanskrit texts, and on the true construction of the authority and having regard to the circumstance that the paramount intention of the husband was secular, *viz.*, to have an adopted son to inherit his zamindari, the words "with the permission of my father" in the authority created a condition precedent to the exercise of the power of adoption, and, therefore, on the death of the father, the power to adopt given to the widow came to an end, and consequently no valid adoption could be made by her (*Rajendra Prasad v. Gopal Prasad*, 32 Bom. L. R. 1588, P. C.).

A Hindu governed by the Bengal school of Hindu law died without leaving any son. By his will he gave directions to his widow to adopt a son to him within ten years of his death from the sons of his brothers : and if it were impossible to take in adoption any of them, then within the next two years, she was authorised to take at her own choice a son of any of his other agnates. The will further provided that if perchance no son was taken in adoption or if the son taken in adoption died sonless, the executors under his will should devote his estate (subject to the provisions for maintenance of the widow, mother and daughter) to a charity. The widow did not take in adoption any one of the sons of her deceased husband's brothers for ten years after his death although it was possible for her to do so, and after more than 11½ years she took one of such sons in adoption. It was *held*, that the authority to adopt must be strictly construed ; and that the adoption more than ten years after the husband's death was not in strict conformity with the authority, and therefore, the adoption was not valid (*Bhupendra v. Puran Sashi*, 41 Bom. L. R. 1159, P. C.).

Where a person by his will authorises that both of his wives shall separately make adoptions, the instrument must be construed on the assumption that he intended his widows to do that which the law allowed and not to do something which was unusual and not practised among the Hindus. Hence he cannot be intended to have authorised simultaneous adoptions by the widows. Similarly, he must have contemplated the procedure whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. In the absence of such refusal or consent by the senior widow, the adoption by the junior widow is invalid (*A. I. R. 1940 Mad 5*).

The fundamental rules as to the construction of documents are the same in England and India. While the Court must, no doubt, have regard to the surrounding circumstances, and, in the case of a document executed by an Indian, to the fact that his surroundings, his manners, *etc.*, are often different from those of an Englishman, the duty of the Court is to ascertain the real intention of the executant of the power from the words used by him in the document itself. In short, the Court is bound to carry out the intention *as expressed* and no further.

Conditional authority. The authority to adopt may be conditional, but the condition must not be illegal. As a rule, a valid condition as regards time, or the selection of a particular boy, should be complied with (28 All. 377). When the husband directs the widow to adopt a particular boy and the widow adopts him, in the absence of an express prohibition, the widow's choice is unrestricted in case she wants to make a second adoption after the death of the adopted son (48 I. A. 513). A direction in a will

to operate as a prohibition against the Hindu widow adopting any boy to her husband as a son except the boy named by him must be explicitly made and clearly intended by the husband to limit the discretion of his widow for all time and on every occasion on which otherwise after his death his widow might validly make an adoption for him. A Hindu, governed by the Bombay school, having no son, made a will in 1911, the material portion of which ran as follows : " A boy should be taken in adoption to perpetuate the name of ancestors and manage the estate... It is expected that any of my paternal uncles' sons may get a son. If he gives the boy my wife should take him in adoption. Seven years' time is allowed for this. After seven years Jivaji's younger son Bhagwati should be taken in adoption ... If this boy (Bhagwati) does not exist, which God forbid, any boy may be taken in adoption ". The testator died in 1918. In 1920, the defendant, the eldest son of Jivaji, was adopted by his widow purporting to act in accordance with her deceased husband's wishes. Before adopting the defendant, the widow tried to secure the defendant's younger brother Bhagwati in adoption, but his mother definitely refused to give Bhagwati in adoption, and the defendant was only adopted after and in pursuance of that refusal. The adoption of the defendant having been called in question by the widow's husband's cousins as reversioners, the Privy Council *held*, that the dominating idea and object of the testator as expressed in the will was that there should without fail be an adoption ; that the period of seven years referred to in the will is to be computed from the date of the will and not from the date of the death of the testator, and that it had expired, therefore, before the adoption in dispute ; that there was no direction either expressly made or clearly intended to limit the discretion of the widow in the matter of adoption in the circumstances of this case, and it could not be construed from the will that unless Bhagwati died, any other adoption was prohibited ; and that, therefore, the adoption of the defendant was valid (*Jagannath Rao*, 35 Bom. L. R. 230).

An authority to adopt, *contingent* upon the happening of a particular event, is valid, if an adoption, made when the event happens, would be otherwise valid. An authority to adopt in case of the death of a son living, or to adopt several sons in succession on the death of the sons previously adopted, is a valid authority

(1 Mad. 174). But an authority to adopt in case of disagreement between the widow and a surviving son would be invalid, and the illegality of the authority would not be cured by the subsequent death of the son (1 Beng. S. D. 324). The result is that the widow cannot adopt at all under such an authority.

Exercise discretionary. When an authority is given by the husband, it does not mean that the widow is under a legal obligation to adopt. She may or may not adopt, and her refusal to exercise the authority would not interfere with her rights in her husband's property (*Mutasaddi Lal v. Kundan Lal*, 28 All. 377, P. C.).

§ 25. Adoption by widow without her husband's authority. The only provinces where a widow can adopt without her husband's authority are the Bombay and Madras Provinces and the Central Provinces.

***Bombay Law.** In Bombay, the adoption by a widow without her husband's authority is governed by the following rules : (1) There must be no express or implied prohibition from the husband (37 Bom. 107). An implied prohibition must be by necessary inference (43 Bom L. R. 483). A prohibition can be reasonably deduced from his disposition of his property or the existence of a direct line (e.g., a daughter's son) competent to the full performance of religious duties or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites (12 M. I. A. 397 ; A. I. R. 1939 Mad. 216). The test to see whether there is an implied prohibition in the husband's will is to see whether the adoption is so contrary to the directions of the testator as to have

* Discuss the right of a Hindu widow to adopt as recognised in the Bombay Presidency. (April, 1925, 1942.)

"Hence a widow has authority to adopt, even without the permission of her husband" (Vyavahar Mayukh). Within what limits has this rule been recognised by judicial decisions? (Oct., 1925.)

What is the extent of the power of a widow in a joint family to adopt a son to her deceased husband? (April, 1928.)

Write a short note on the present state of the law relating to the power of a Hindu widow to adopt in Maharashtra. Cite decisions. (April, 1943.)

been prohibited by him (A. I. R. 1943 Bom. 423). In the absence of a prohibition, an authority is presumed to have been given to her, even when the husband was a minor at the time of his death, or even when the widow was living apart from her husband (*Lakshmibai v. Sarasvatibai* 23 Bom. 789). A persistent refusal by the husband to adopt during his life-time does not amount to an implied prohibition (51 Bom. 217).

(2) The widow cannot dispute the adoption made by the husband, even though its validity may be doubtful. Nor can she adopt, when her husband died leaving an invalidly adopted son, during the lifetime of such an adopted son (46 Bom. 400, 946).

(3) If her husband was separate at the time of his death, the widow may take a son in adoption *without the consent of her husband's sapindas* (*Moottoo Ramalinga's case*), provided her power of adoption is not extinguished (*vide* § 26, *infra*).

(4) Even if her husband was joint at the time of his death and died as a member of an undivided coparcenary, the widow may take a son in adoption *without the consent of the surviving coparceners* (*Bhimabai v. Gurunathgauda*, 35 Bom. L. R. 200, P. C.). Thus in this case also, it is not necessary for the widow to obtain any consent. What is material is that her power of adoption must not have been extinguished (*vide* § 26, *infra*).

(5) The senior widow can adopt without consulting the junior widow. The junior widow can adopt only (a) with the consent of the senior widow, or (b) if she has express authority from her husband, or (c) if she has succeeded to the property as her son's heir, or (d) with the consent of her father-in-law, if her husband was joint with his father at the time of his death.

(6) Her motive in making the adoption is immaterial. "The rule is firmly established that in the Bombay Presidency a widow, who has no authority from her deceased husband, may adopt a son to him, and that it is not necessary for her to obtain the consent of his kinsmen. It depends entirely upon her discretion whether she should or should not make an adoption, and her choice in the matter cannot be restricted" (*Vijaysingji v. Shivasangji*, 37 Bom. L. R. 562 : 58 Bom. 360 P. C.). It was contended in this case that the adoption made by the widow was not made for the spiritual benefit of her husband, but from an

improper motive, *viz.*, to deprive her husband's collateral of his right of inheritance to the impartible estate in dispute under the rule of primogeniture. In negating the contention, the Privy Council held that there was no evidence to prove any improper motive, and further that if the adoption caused harm to the collateral, it nevertheless conferred spiritual benefit upon the husband of the widow (*ibid*). Money paid to a widow to induce her to adopt is in the nature of a bribe which is condemned by all the Smriti-writers as an illegal payment (*Sitaram v. Harihar*, 35 Bom. 169). An adoption, however, is not invalid, merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption (*Narayan v. Gopalrao*, 46 Bom 908).

Bhimabai v. Gurunathgauda (1933, 35 Bom. L. R. 200 = 57 Bom. 157, P. C.). Before this decision of the Privy Council, there was a series of decisions of the Bombay High Court laying down that a widow, in the absence of authority from her deceased husband, could not adopt without the consent of her husband's surviving coparceners, if her husband died as an undivided member of a coparcenary (*Ramji v. Ghamau*, 6 Bom. 498, F. B. ; *Ishwar Dadu v. Gaiabai*, 50 Bom. 488, F. B. ; 30 Bom. L. R. 859 ; *etc.*). In *Bhimabai v. Gurunathgauda*, their Lordships of the Privy Council held that under Hindu law, as prevalent in the Mahratta country of the Bombay Presidency, *the widow of a coparcener in a joint Hindu family has power to make a valid adoption, without either express authority of her husband or the consent of his surviving coparceners*. "The *Mayukha* and the *Kaustubha* (a book of authority), which govern the Mahratta school, regard adoption by a widow as a religious duty, which does not require the authority either of the husband or his kinsmen." In a subsequent case the Privy Council treated the rule as firmly established in the Bombay Presidency that a widow, who has no authority from her husband, may adopt a son to him and that it is not necessary for her to obtain the consent of his kinsmen (*Vijayasangji's case*).

History of Bombay law. In *Ramji v. Ghamau* (1882, 6 Bom. 498, F. B.), a full bench of the Bombay High Court decided that a widow, whose husband was *joint* at the time of his death, cannot adopt without the consent of her father-in-law, and in his absence, of her husband's undivided coparceners. That decision was re-affirmed 43

years afterwards in *Ishwar Dadu v. Gajabai* (1925, 50 Bom. 468, F.B.), by another full bench of the same High Court. The full bench in this latter decision held that *Ramji v. Ghamau* was not overruled by the Privy Council in *Yadao v. Namdeo* (1921, 48 I. A. 513). In *Yadao v. Namdeo*, it was observed by the Privy Council that in the Mahratta country of the Bombay Presidency and in Gujarat a widow, whose husband had not expressly forbidden her to adopt a son to him had power to adopt without the consent of her husband's kinsmen, whether or not her husband's estate had vested in her, and whether he died joint or separate in property. The observation was held to be *obiter* in *Ishwar Dadu's* case, and the principle laid down in *Ramji v. Ghamau* continued to be the accepted law as regards the power of adoption by a Hindu widow in Bombay, when her husband died as a member of an undivided family. In *Bhimabai v. Gurunathgauda*, the question was whether, under the law prevalent in the Mahratta country of the Bombay Presidency, a Hindu widow, whose husband was undivided at the time of his death, and who has not the express permission of her husband, may adopt a son to him without the consent of the surviving coparceners. Their Lordships held that the adoption in dispute in the case was not invalid on the ground that it was made by the widow without the permission of her husband and without the consent of the surviving coparceners. Their Lordships held that *Ramji v. Ghamau* was overruled by *Yadao v. Namdeo*, and that the opposite view taken by the full bench of the Bombay High Court in *Ishwar Dadu v. Gajabai* was wrong, and that *Ramji v. Ghamau* was wrongly decided. Their Lordships approved an earlier Bombay ruling in *Rakhmabai v. Radhabai* (1868, 5 B. H. C. R., A. C. J., 181). In *Rakhmabai's* case, it was observed that a Hindu widow in the Mahratta country may, without the permission of her husband, and without the consent of his kindred, adopt a son to him. This case was one of an adoption by a widow in a divided family, but in *Bhimabai's* case the Privy Council held that though it was so, the decision represented the construction put upon the Mayukha by the Court, and as the Mayukha does not draw any distinction between an adoption by a widow in a divided family and an adoption by a widow in a joint family, the law is the same, whether the husband of the widow died joint or separate.

It may be noted that the law of the Central Provinces is the same as that of the Bombay Province (*Yadao v. Namdeo*).

Madras law. Unlike the Bombay law, in the Madras school a widow, whose husband died as a member of an undivided family and without authorising her to adopt a son to him, must obtain the consent of her father-in-law, if he be living, and in his absence, of the surviving coparceners in order to make a valid adoption. In a divided family, where the widow has taken the estate of her husband, she must obtain the consent of her hus-

band's father and, after his death, of her husband's sapindas. The consent must be of the nearest sapindas ; if such a sapinda improperly withholds his consent, the widow can seek the consent of the next nearest sapindas. As a widow in the Madras Province can only adopt when she has received authority to do so (*i.e.*, direct authority of the husband either before his death or at his death by will, or by the consent of his sapindas), her motive in making the adoption is entirely irrelevant (A. I. R. 1941 Mad. 937, F. B.). It is not necessary that the sapinda should consent to the adoption of a particular boy in order to make the adoption valid. The authority by the sapinda may be expressed in general terms and it may be exercised within a reasonable period, provided the circumstances have not materially changed (A. I. R. 1941 Mad. 935, F. B.). A sapinda, after he has once given his consent, cannot at his pleasure withdraw his consent (A. I. R. 1937 Mad. 110). A daughter's son need not be consulted and consent of the nearest sagotra sapindas is sufficient (A. I. R. 1940 Mad. 356, F. B.). The consent of the majority of sapindas is not always necessary for the validity of an adoption. It is not a question of a majority or a minority. If the majority have given their assent, it will be presumed such assent was given on *bona fide* grounds. But where the majority refuse, it is open to the widow to prove that the refusal was actuated by improper motive (A. I. R. 1942 Mad. 300). Where two out of six sapindas give their assent and the rest improperly withhold their assent, the adoption is valid (A. I. R. 1942 Mad. 606). A widow can lawfully adopt with the assent of remoter sapindas if the nearest reversioners improperly withhold their assent (*ibid*). There is no residuary power in a widow to adopt when her husband's sapindas are all dead (A. I. R. 1940 Mad. 950). But when her husband died as an undivided member and the sole surviving male member of the joint family is a lunatic or a minor, the widow has the right to travel outside the joint family and make an adoption with the consent of the nearest divided sapindas (A. I. R. 1942 Mad. 606). It should be noted that in Madras also, even when the necessary consent has been obtained, it should be shown that the power of adoption of the widow has not come to an end (*vide infra*).

§ 26. Termination of widow's power to adopt. A

widow's power of adoption is limited. The power is limited whether the widow has a written authority from her husband to adopt, or whether, though she has no such authority, she wants to make an adoption, as a widow can in the Bombay and Madras Provinces and the C. P. (*Bhoobun Moyee v. Ram Kishore*, 10 M. I. A. 279). Once that limit is reached, the power of the widow to adopt is at an end (8 I. A. 229 ; 14 I. A. 67).

Mitakshara separate family. *The widow's power of adoption in the case of a Mitakshara separate and a Dayabhaga (joint or separate) family would be extinguished when her husband dies leaving a son, and the son subsequently dies leaving a natural or adopted son, or leaving no son, but his own widow, to continue the line by adoption (*Ram Krishna v. Shamrao*, 26 Bom. 526). "Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived" (*ibid*). So long as this limit to her power is not reached, the fact that the estate of her husband is not vested in her, on account of its being in the nature of an impartible estate or a *jivai* grant is immaterial. But when her power is *extinguished* by the estate vesting from her son to the son's widow or son's son, it can never be revived by the estate coming into her hands subsequently. Where a person dies leaving a widow W and a son S, and then S dies leaving his own widow SW, W cannot make a valid adoption to her husband, even though she might have succeeded to the estate on the death of SW (*Krishnarav v. Shankarrav*, 17 Bom 164). Similarly, where a person dies leaving a widow W and a son S, and S dies subsequently leaving his own son SS, W cannot make a valid adoption, even though on the death of SS she has succeeded to the estate and her adoption would divest no estate but her own (*Ram-chandra's case*, approved by P. C in *Madana Mohana*, 45 I. A.

* State the extent of a widow's power to adopt under the Mitakshara law when her husband has died separate. Does it ever terminate? (Oct., 1931.)

When is a Hindu widow's power to adopt to her husband terminated according to the Mitakshara law, where her husband was divided at the time of his death? (March 1939)

156). Whether in order to bring this principle into play it is essential that the son's widow should herself be clothed with the power of adoption (in those provinces where such authority is necessary), is left open by the Privy Council in *Amarendra's case* (*vide infra*). If, however, on the death of the husband X, the estate goes directly to the grandson V, the son being dead, and the widowed grandmother W succeeds to the grandson V, on his death unmarried or without leaving any issue or widow, the grandmother W can make a valid adoption (*Narhar v. Balvant*, 48 Bom. 559). A Hindu died leaving him surviving a widow and a son. Thereafter the son died leaving his own widow. The son's widow remarried. Subsequently, the widowed mother adopted a son. It was held that the adoption was invalid, for the power of the mother to adopt a son was extinguished on the death of her son leaving a widow (*Ramchandra v. Murlidhar*, 39 Bom. L. R. 599). The Nagpur High Court holds, however, that in such a case the mother's power to adopt is revived, and she can validly adopt a son to her deceased husband (A. I. R. 1941 Nag. 116). An adopted son died leaving behind him two daughters as his only heirs, his wife having predeceased him. The adoptive mother could validly adopt again to her husband (39 Bom. L. R. 591).

"In their Lordships' opinion, it is clear that the foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites. And it may well be that if this duty has been passed on to a new generation, capable itself of the continuance, the father's duty has been performed and the means provided by him for its fulfilment spent: the 'debt' he owed is discharged, and it is upon the new generation that the duty is now cast and the burden of the 'debt' is now laid. . . . Where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son die himself sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive" (*Amarendra v. Sanatan Singh*, 1933, 35 Bom. L. R. 859, P. C.). The fact that the son had attained

the age of discretion, or even of majority, and could have himself adopted a son if he had so chosen, would not affect the widow-mother's power of adoption, provided the son died without leaving a grandson or his own widow. Attainment by the son of "ceremonial competence" or of "full legal capacity to continue the line" in connection with the question of the termination of the widow-mother's power of adoption would mean a capacity to continue the line in one of the two defined ways, "*either by the birth of a natural son, or by the adoption to him of a son by his own widow ; and the test is to be whether these conditions exist at the time of the son's death.*" These expressions cannot be taken as indicating any other moment in the son's life as extinguishing the mother's power of adoption. Thus, where the son died unmarried at the age of twenty years and six months (*Amarendra's case*), or where the son died without issue at the age of thirty his wife having predeceased him (*Venkappa v. Jivaji*, 25 Bom. 306), it was held that the mother's power of adoption was not extinguished (*vide*, also 46 Mad. 423 ; 30 I. A. 234). "Having regard to the well-established doctrine as to the religious efficacy of son-ship, their Lordships feel that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man" (*Amarendra's case*).

According to the decision of the Privy Council in *Pratap sing v. Agarsingh* (46 I. A. 97), a widow's power to adopt is not dependent on her inheriting, as a Hindu female owner, her husband's estate. "She can exercise the power, so long as it is not exhausted or extinguished, even though the property is not vested in her" (*Hirabharathi v. Javer*, 30 Bom L. R 1555).

In *Amarendra v. Sanatan Singh*, the Privy Council observed, "Now the case law has arrived at a point where it would be impossible to say that the sole test of the validity of an adoption is the vesting or divesting of property. The vesting of the property on the death of the last holder is some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or their Lordships would add, by inheritance, *cannot be in itself the test of the continuance or extinction of the power of adoption*". Their Lordships emphasised that the substitution of a son to the deceased for

spiritual reasons is the essence of adoption, and the consequent devolution of property is a mere accessory to it. In the Brahmanical doctrine of adoption, "the devolution of property, though recognised as the inherent right of the son, is altogether a secondary consideration" (*Sir Raghunath v. Sri Brozo Kishore*, 3 I. A. 154). In a still more recent case, the Privy Council held, that the principle that a widow cannot adopt a son to the deceased husband, if by so doing she would defeat an estate other than her own, was not now a correct exposition of the law. "The power of a widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of an adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her" (*Vijayasangji's case*).

If the son has predeceased the father, and the father dies leaving behind him his widow and the predeceased son's widow, an adoption by the son's widow during the lifetime of the father's widow is not valid (A. I. R. 1938 Lah. 539). A Hindu died leaving behind him his widow, a daughter and a predeceased son's widow. The widow died and the estate was consequently vested in the daughter. Thereafter, the predeceased son's widow (daughter-in-law) adopted a son to her husband. The daughter sued for a declaration that the adoption was invalid and that she was entitled to the father's property as heir. It was held, that the vesting of the property in the daughter after the death of the widow did not extinguish the right of the daughter-in-law to adopt, a right which was co-extensive with her duty to provide a son for her husband; that the adoption was legal and valid; and that the adopted son, who, by virtue of the adoption, acquired the status of a natural grandson, was entitled to the estate in preference to the daughter (38 Bom. L. R. 100). In the case of co-widows, if only one of them has a son who succeeded to the father's estate and on the son's death, his mother succeeds to the estate, it was held that the step-mother's power of adoption was extinguished even though the son had died sonless and unmarried (30 Bom. L. R. 1555). It is submitted this is not good law in view of the later Privy Council decisions.

Adoption by a widow of a gotraja sapinda. A question peculiar to the Bombay school is the one relating to an adoption by a widow who has inherited an estate as a widow of a gotraja sapinda. Under the other schools only the widow of the propositus himself and of his direct ancestors, such as the mother and the paternal grandmother, are in the line of heirship. Under the Bombay school, all

widows of the gotraja sapindas (agnates within specified degrees) are entitled to inherit (*vide* § 95, clause 4). The earlier Bombay view was that a widow, inheriting the estate of a gotraja sapinda and not of her own husband, was incompetent to make a valid adoption to her husband (52 Bom. 393). In view of the recent Privy Council decisions, this earlier stand was modified. It was held in the Full Bench decision in *Radhabai v. Rajaram*, (1938) 40 Bom. L. R. 559, that the adoption is valid, but it does not alter the devolution of the estate on her death among the reversionary heirs. On the death of the last coparcener in a joint family, the widow of his paternal uncle succeeded to the property as the widow of a gotraja sapinda. She made an adoption. In a suit by a reversioner to have the adoption declared invalid, it was held, that the adoption though valid had no effect on the family property which devolved upon the reversioner. In a later case, it was held that the adopted son does not divest the life-interest in the estate vested in his adoptive mother. "The idea of an adopted son taking his adoptive mother's life-interest in an estate is entirely unknown to Hindu law" (*Madhavsang v. Dipsang*, 1942, 44 Bom. L. R. 661, *vide* 1943 A. I. R. Bom. 89). It is submitted that this view cannot be upheld in view of the recent Privy Council rulings, especially the latest in *Anant v. Shankar* (1944, 46 Bom. L. R. 1). The adoption by a widow of a gotraja sapinda is valid and it must have effect. Such an adopted son would practically always be a preferential heir to the estate than his adoptive mother, because a widow of a gotraja sapinda can inherit only on failure of all males in the particular line. The only case, when this would not be so is the rare chance that the widow is of a sapinda related in the last (*i.e.*, seventh) degree of agnatic relationship, so that the adopted son would not belong to the class of sapinda heirs, but being in the eighth degree would belong to the second class of heirs, namely, samanodakas (*vide*, § 91 and 94).

Mitakshara Joint Family. The above principle would also apply to the power of adoption of a widow whose husband was at the time of his death a member of an undivided Mitakshara family (55 Mad. 581). The widow's power of adoption is not affected by any of the following facts, namely, (1) that her deceased husband's undivided coparcenary interest has vested in the other coparceners by the right of survivorship (*Bachoo v. Mankorebai*, 34 I. A. 107), or (2) that the surviving coparceners have made a partition and divided the family estate (*Sankaralingam v. Veluchani*, A. I. R. 1943 Mad. 43, F. B., *Bajirao v. Ramkrishna*, A. I. R. 1942 Nag. 19), or (3) that the family estate had vested in a sole surviving coparcener and on his death it has devolved by succession on his heir other than the adopting widow (*Anant v. Shankar*, 1944, 46 Bom. L. R. 1, P. C.) In all these

cases, the adoption is not merely valid for religious purposes but it will have effect. The adoption must be deemed to date back to the death of the adoptive father. The adopted son is entitled to be put into possession of his adoptive father's share of the family estate. This means that if that share has vested in the surviving coparceners, they would be divested of it. If the family estate has devolved on the heir of the last surviving coparcener before the adoption, the adopted son would become the sole surviving coparcener by virtue of his adoption and the whole family estate would be vested in him by divesting the heir who had inherited it before the adoption. If the surviving coparceners had come to a partition before the adoption, the adopted son is entitled to demand a re-opening of the partition and get his adoptive father's share in the fresh partition (*Sankaralingam v. Veluchani* ; *Rajirao v. Ramkrishna*). After partition the coparcenary may be extinct as between members who were parties to the partition, but the rights of others are not affected unless they claim under or through them. So far as the adopted son is concerned, the family will be deemed to continue joint and he will be entitled to a share in the family property, as if the partition were not made. He is entitled to demand a fresh partition, just as a posthumous son or an absent coparcener is (*vide* § 97).

The earlier decisions of the Indian Courts laid down a second event as putting an end to the power of adoption of a widow whose husband died as a member of an undivided Mitakshara family, *viz.*, if the coparcenary of which the husband of the widow was an undivided member had become extinct by the death of the last surviving coparcener and his property had thereby devolved by succession to his heirs (*Chandra v. Gojabai*, 14 Bom. 463, *Advi v. Nidamarthy*, 33 Mad. 228 ; *Shivbasappa v. Nilara*, 47 Bom. 110). But the Madras High Court had held that where the coparcenary did not become extinct as above, but by the surviving coparceners having come to a partition of the joint family property, the power of adoption of the widow of the deceased coparcener was not thereby extinguished (*Panyam v. Ramalakshamma*, 55 Mad. 581).

The decisions of the Privy Council in *Amarendra v. Sanatan Singh* and *Vijaysingji v. Shivasingji* led to a conflict of decisions. In the first Bombay case, it was decided following the earlier ruling in *Amarendra v. Gojabai* (1890, 14 Bom. 463), that when the sole surviving coparcener has died and the family estate has vested in his heir other than the adoptive widow, who was a widow of a pre-deceased coparcener, the adoption was invalid (*Vishnu v. Laxmi*, 1935, 37 Bom.

L. R. 193). It should be noted that this question arises only if the adoptive widow is the widow not of the last surviving coparcener, but of a coparcener who has died earlier than the last surviving coparcener during the subsistence of the coparcenary; for, if the adoption is made by the widow of the last surviving coparcener, the question would be governed by the general rule governing a separate Mitak-hara family. Then in *Shankar v. Shamrao*, (1935) 37 Bom. L. R. 786, and *Dhondt v. Rama*, (1936) 38 Bom. L. R. 94, it was held that in the circumstances mentioned above, the adoption is valid in view of the Privy Council rulings, but that the adoption does not divest the family estate vested in the heir of the last surviving coparcener, and the adopted son does not get this estate. The question next arose in a Full Bench decision in *Balu v. Sakharani* (1937) 39 Bom. L. R. 382, and it was held, approving the latter two decisions mentioned above, that the adoption was valid but it did not divest the estate vested in the heir. The facts of this case were as follows: The last surviving coparcener in a joint Hindu family died in 1919 leaving behind him surviving his widow and his sister. The widow succeeded to the family property. On her remarriage in 1926, the property went to the sister. There were in the joint family two widows of two pre-deceased coparceners. One of these widows adopted a son in 1923. A question having arisen as to whether the adoption was valid, and, if so, whether it had the effect of divesting the property in the hands of the sister, it was held, that though the adoption was valid, it could not divest the estate which had already vested in the sister. This decision was followed in all the subsequent decisions of the High Court but on the appeal to the Privy Council on a subsequent case decided by this High Court, the view that the adoption did not divest the estate has been overruled (*vide, Anant v. Shankar*, 1944, 46 Bom. L. R. 1).

The principle of the Full Bench decision in *Balu v. Sakharani* was extended to the case where the joint family comes to an end not by the death of the last surviving coparcener but by a partition among the surviving coparceners. An undivided Hindu family consisted of two brothers. One of them died leaving his widow behind him. The other brother, who had a son, partitioned the family property between himself and his son, providing for the maintenance of the brother's widow. The latter thereafter adopted a son. It was held, that the adoption, though valid, did not give the adopted son a right to the property inasmuch as the coparcenary had come to an end on partition between the surviving coparceners (*Irappa v. Rachavya*, 1938, 40 Bom. L. R. 1300). Thus, the Bombay view before the Privy Council decision in *Anant v. Shankar* was that an adoption in order to affect the property must have taken place at a time when the coparcenary was in existence, and if it was made at a time when by death or by partition the coparcenary had come to an end, it would not revive the coparcenary and would not have the effect of divesting property which had vested in a person either as an heir of the last single coparcener or

in two different persons by partition of the family property. If a coparcenary has come to an end before a boy is adopted, his adoption, although it may be valid for religious and spiritual purposes, cannot be deemed as valid for affecting the family property (*per* Divatia J. in *Bammagouda v. Shankargouda*, A. I. R. 1944 Bom. 67).

The Nagpur High Court dissented from the Bombay view, and held that a person in whom the property is vested after the death of the sole surviving coparcener takes it subject to defeasance in the event of an adoption by the widow of a predeceased member of the former joint family. The adopted son must get such interest as his father would have got had he been alive. When, therefore, after the death of the last male holder his widow is in possession of the entire estate and the widow of a pre-deceased coparcener adopts a son, the adoption is valid and divests the widow of the last male holder (A. I. R. 1943 Nag. 253). If after the death of this adopted son, the widow of the last male holder adopts a son, that adoption is also valid because she has no less power to adopt a son to her husband than the widow of the predeceased coparcener had to adopt a son to her husband (A. I. R. 1938 Nag. 423). She can adopt apart from the question of the death of the son adopted by the widow of the predeceased coparcener. If she does so, the two adopted sons would constitute a joint family. Thus, all the widows of the members of a joint Hindu family can separately adopt sons to their respective husbands, the only limitation being that the power of adoption should not have terminated under the general rule. A joint family may consist of surviving female members only. A and his two sons and a widow of A's brother B constituted a joint family. A and his two sons partitioned. After this, B's widow made an adoption. It was *held*, the adopted son was entitled to have the same rights in the joint family property, which his father would have had if he were alive. He becomes a sharer in the family and divests them of his share (*Bajirao v. Ramkrishna*, A. I. R. 1912 Nag. 19). A Full Bench of the Madras High Court also took the same view. A Hindu father and his four sons constituted a joint Hindu family. Two of the sons predeceased the father, leaving their widows but no issue. Then the father died. The surviving two sons partitioned the family estate between themselves. Thereafter, each of the widows of the two predeceased sons made an adoption of a son to her respective husband. It was *held*, that a partition does not mean the extinction of the family; that after partition, a coparcenary may be extinct as between the parties to the partition, but the rights of others, not claiming through or under them, are not affected; that an adoption must be taken to date back to the death of the adoptive father, which means that the adopted son is entitled to be put into possession of his adoptive father's share of the family estate, subject to lawful alienations in the meanwhile; that a partition between the surviving coparceners is not such an alienation; and that the adopted son is entitled to reopen the partition, subject to lawful alienations made by the copar-

ceners before the adoption (*Sankaralingam v. Veluchani*, A. I. R. 1943 Mad. 43, F. B.).

P. C. decision of *Anant v. Shankar* (1944, 46 Bom. L. R. 1). On an appeal from a decision of the Bombay High Court, the Privy Council approved the decisions of the Madras and the Nagpur High Courts, and overruled the Bombay Full Bench decision in *Balu v. Lahoo* and the decision in *Chandra v. Gojrabai* (14 Bom. 463), the latter in so far as it held the adoption to be invalid and the former in so far as it refused effect to the adoption, when it was made by a widow of a pre-deceased coparcener after the family estate had devolved after the death of the last surviving coparcener upon an heir other than the adoptive widow. Keshav, the last surviving coparcener in a joint Hindu family, succeeded to watan lands from his father and also inherited two pieces of watan lands from his separated paternal uncle. He died unmarried in 1917, leaving behind him his mother and a remote collateral. Under the provisions of the Bombay Hereditary Offices Act (Bombay Act III of 1874) as amended by the Bombay Act V of 1886, the collateral succeeded to the watan lands in preference to the mother. The mother adopted Anant as a son to her husband in 1930. It was held, that the adoption was valid and that the adopted son was entitled to recover the family watan lands as well as the two plots of watan land inherited by Keshav from his separated uncle. Their Lordships rejected the view that the mother's power to adopt came to an end on her son's death by reason that he was the sole surviving coparcener in the joint family. They held that *the adoption being valid cannot be refused effect*, and that the fact that the property had vested in the meanwhile in the heir of Keshav was not of itself a reason why it should not divest and pass to the adopted son. Where the adoption is made by the widow of a pre-deceased collateral of the last surviving coparcener, the death of the latter before adoption is no ground for denying that the interest of the adoptive father or any part of it passes to the adopted son. In the present case the adopting widow was the mother of the last surviving coparcener. Her power to adopt could not have been exercised in his lifetime, and if exercised after his death, cannot be given any less effect than would have attached to an adoption made after his death by a widow of a pre-deceased collateral. It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener. The question of remoteness or nearness in blood relationship from the last male holder has no relevance or effect as an answer to a claim by the adopted son to derive an interest in the family property from his adoptive father. If the adoption constitutes the person adopted the nearest heir of the last male holder, it is an alternative or additional ground of claim and one which proceeds on a different basis. Their Lordships referred to the rule of law stated by the Privy Council in an early decision (*Bhubaneswari Debi v. Nilkomul Lahiri* 1885, 12 I. A. 137, namely, "an adoption after the

death of a collateral does not entitle the adopted son to come in as heir of the collateral," and stated they say nothing about it. This rule, it would seem, means that when the estate of a collateral of the husband of the adopting widow has vested before the adoption in the heir of the collateral, other than the adopting widow, that it would not be divested because the adopted son would have been a nearer heir of the deceased collateral than the heir who had inherited, if the adoption were made before the death of the collateral. This rule would thus apply when the estate in question did not belong to the family of the adoptive father of the adopted boy. It would not apply when it had belonged to this family. If it had belonged to this family, the fact that the adoptive father's share has passed by right of survivorship to the surviving coparceners, or that, further, on the death of the last surviving coparcener it has devolved on his heir, or that the surviving coparceners have come to a partition, or that the father's estate had devolved on a remoter heir than the adoptive mother by reason of a special rule of inheritance, would not matter. The adopted son would get his adoptive father's interest in it and would divest the person in whom it was vested in the meanwhile. If the whole of the property belonged to the adoptive father, he would take the whole of it. If the adoption would constitute the adopted son, the sole surviving coparcener he would take not only his father's interest but the whole estate by right of survivorship. Their Lordships quoted with approval the following observation of the Nagpur High Court in *Bajirao v. Ramkrishna* (A. I. R. 1942 Nag. 19) : " We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member ". The adding of a male member in the way of law is by an adoption by a widow of the joint family. This decision of the Privy Council has thus far-reaching consequences on the effect of an adoption.

Other Privy Council Rulings : -*Bhimabai v. Gurunathgauda* (1933, 35 Bom. L. R. 200). D and his three sons, N, K and J constituted a joint Hindu family. D died ; then K separated, and N and J continued to be joint. J died in 1913 leaving his widow Bhimabai and on his death his undivided coparcenary interest passed to N by survivorship. In 1915, N, who had no male issue, adopted A. N then died and the joint family property passed by survivorship to A. A died in 1919, leaving a widow T and a son B, and the joint family property passed to B by survivorship. B was then a year old and T managed the property on his behalf. A few months later, Bhimabai adopted a son to her deceased husband J. The adoption was not made under any express authority from her husband, nor was it made with the consent of B who was then the sole surviving coparcener. B, in fact, was a minor at the date, and incapable of giving his consent. It

was the validity of this adoption which was in question before their Lordships of the Privy Council. It was *held*, that under the Hindu law as prevalent in the Mahratta country of the Bombay Presidency (by which the parties in question were governed), the widow of a coparcener in a joint Hindu family has power to make a valid adoption without either the express authority of her husband or the consent of the surviving coparceners; that the full bench decision of the Bombay High Court in *Ramji v. Ghamau* was overruled by the decision of the Privy Council in *Yadao v. Namdeo*, and that the opposite view taken by the Bombay High Court in a subsequent full bench decision in *Ishwar Dadu v. Gajabai* was wrong; and that as the estate in the present case had till then passed by survivorship and not by succession, and as the adoption was not made after the extinction of the coparcenary but during its subsistence, the principle of the decision in *Chandra v. Gojarabai* did not apply, and that, therefore, the adoption was valid.

Amarendra v. Sanatan Singh (1933, 35 Bom. L. R. 859-12 Pat. 642). A Hindu governed by the Benares School, died leaving a son and a widow to whom he gave authority to adopt in the event of the son's death. The son succeeded to the father's estate and died unmarried at the age of twenty years and six months. By a family custom, females were excluded from inheritance, and on the son's death the estate vested in the plaintiff, his nearest collateral heir. Within a week from her son's death, the widow mother, under the authority conferred upon her, adopted the defendant as a son to her deceased husband. It was *held*, that though the mother was precluded by custom from inheriting to her son, and the adoption had the effect of divesting the estate which had previously vested in the plaintiff, her power of adoption under her husband's authority was not exhausted at the death of her son, and that the adoption of the defendant was valid.

Vijaysingji v. Shivasingji (1935, 37 Bom. L. R. 562). C, the owner of an impartible taluqdari estate, known as the Ahima estate, in Gujarat in the Bombay Province, died leaving behind his only son A and a widow K. The succession to the estate being governed by the rule of lineal primogeniture and females being excluded from inheritance, A inherited the Ahima estate. Subsequently, A was given in adoption by K to another family. Although A was then a married man, aged about thirty-three years, his adoption was in accordance with the Hindu law as recognised in the Bombay Province (*vide* § 29 below), and he became a member of the adoptive family. Thereafter, his mother K adopted M as a son to her deceased husband C. A's paternal uncle, claiming as the next male heir, sued to recover possession of the Ahima estate on the ground that A, by reason of his adoption out of the family, forfeited the Ahima estate which thereupon devolved upon him in accordance with the rule of primogeniture. It was *held*, that, inasmuch as upon his adoption out of the family, A and his wife ceased to exist for the purpose of continuing the line in

the natural (*i.e.*, Ahima) family, his mother K had a right to make an adoption to secure that object ; that the adoption of M was therefore valid and could not be impeached on the ground that it would defeat the estate which had vested in some other person ; and that A's paternal uncle could not, in the circumstances, inherit the Ahima estate.

§ 27. An agreement not to adopt would not bind persons who are not parties to the agreement, such as their descendants. As to the effect of such an agreement on the actual parties, an adoption in breach of it would not be invalidated, but so far as the property, the subject of such an agreement, is concerned, it might find them.

§ 28. Who can give in adoption. The only persons who can give a boy in adoption are his *father* and *mother*, provided they have attained the age of discretion and are of sound mind (33 Bom. 107). This right belongs exclusively to them and does not admit of delegation (10 Bom. H. C. 268). No other relation, not even an elder brother, or a step-mother, or a grandfather, can give a boy in adoption. But though the power to give belongs to parents alone, the physical act of giving in adoption may be delegated. By conversion to another religion a Hindu father does not lose his right of giving his Hindu son in adoption, and he may delegate the formal act of giving to a qualified Hindu (*Shamsing v. Santabai*, 25 Bom. 551). The father has the primary right ; the mother cannot give during his lifetime. Where the father gives his permission, or enters a religious order, or has become incapable of giving his consent, or has lost his reason, the mother can give the son in adoption (30 Cal. 965) In the case of a widow, no special authority from her husband to give is necessary, provided there is no express prohibition from him. A step-mother is unable to give her step-son in adoption because there is absence of parental relationship (16 Mad. 384). A father, on his own adoption, does not lose his right to give in adoption his son, born before his adoption, who has remained in the father's natural family (*Martand v. Narayan*, 41 Bom. L. R. 845, F. B.). Even amongst Sudras, a woman is incompetent to give in adoption her son born of adulterous intercourse (43 Bom. L. R. 314 ; A. I. R. 1944 Bom. 40).

In a Full Bench decision, the Bombay High Court, following an earlier decision in *Panchappa v. Sangnbasawa* (24 Bom.

89), has held that a widow on her remarriage *cannot give* a son by her first husband in adoption (*Fakirappa v. Savitreva*, 23 Bom. L. R. 482, dissenting from *Putlibai v. Mahadu*, 33 Bom. 107).

§ 29. **Who can be adopted.** A person must fulfil the following conditions before he can be eligible for adoption : (1) He must be a *male*, (2) must not be an orphan, (3) must belong to the same caste but not necessarily to the same sub-division of the caste as the adopter, and (4) must not be related to the adopter as a daughter's son, sister's son, or mother's sister's son. In Bombay and Patna, there is no restriction as to the age, so that even a person older than the adopter, or one married and having children, can be taken in adoption (44 Bom. 387). The other schools put restrictions as to the age. The Bengal and the Benares schools require that the son should not have been invested with the sacred thread (*Upanayana*) in the natural family. The Madras High Court also requires that the boy should be adopted before *Upanayana*, except where the parties belong to the same *Gotra*, when he may be adopted before marriage. The adoption of a married man is invalid in a case governed by the Madras school (38 Bom. L. R. 317, P. C.). A girl cannot be adopted (A. I. R. 1941, Lah. 218), not even in the case of Naikins, according to the Bombay High Court.

* The requirement No. 4 as to relationship is the survival of the original rule that no one could be adopted whose mother in the maiden state the adopter could not have legally married. It was founded upon a fiction "that the adopting father has begotten the boy upon his natural mother; therefore it is necessary that she should be a person who might lawfully have been his wife". The reference is to the relationship of the adopting father and the natural mother prior to their marriages. For this reason, a person cannot adopt his daughter's son, or his sister's son or his mother's sister's son, as he could not have married his daughter or sister or mother's sister. Under the original rule, if interpreted literally, there would be many other relations incapable of being adopted, e.g., a half brother, but the rule, as interpreted by decisions, is confined to the three relations named above in the condition No.

* Discuss the scope and limitations of the rule that no one can be adopted whose mother in her maiden state the adopter could have legally married. (April, 1941.)

4. Even in this limited scope, the requirement, however, does not apply to the Jains and the Sudras (39 Bom. L. R. 1282), and even among the higher castes, if there is a custom sanctioning the adoption of the daughter's son or sister's son or mother's sister's son, such an adoption will be upheld (22 Bom. 973 ; 9 Mad. 44 ; 40 Bom. L. R. 960).

According to the Calcutta High Court, a boy to be eligible for adoption must be able to fulfil the religious obligations enjoined on a son by the Shastras, namely, of offering pindas with the recitation of *mantras* in the *sraddha* ceremony. Hence a person who is ineligible to utter the *sraddha mantras* or is unable to utter them owing to physical defects cannot perform the essential shastric duties, and consequently such a person cannot be taken in adoption. According to the Calcutta High Court, the eligibility for adoption must be tested by the rules of exclusion from inheritance [*vide*, § 110 (4) below]. A person who is congenitally deaf and dumb cannot be validly adopted (A. I. R. 1943 Cal. 613).

The adoption of an only son, the eldest son or of a stranger in preference to a relation, is valid (*Sri Balusu v. Sri Balusu*, 22 Mad. 398). But as a boy can be given in adoption only by the father and mother, an orphan cannot be adopted, except where sanctioned by custom (*Ramkishore v. Jainarayan*, 49 Cal. 120, P. C.). Even Jains, who do not believe in the religious aspect of adoption, cannot adopt an orphan, as the act of giving in adoption is essential among them also (*Dhanraj v. Sonibai*, 52 I. A. 201).

In Madras, adoption of a girl by a *devdasi* is valid. *Devdasis* are a community of dancing girls, who have been dedicated to temples. No particular ceremony is necessary for an adoption by a *devdasi*. There is, therefore, no legal necessity for a giving and taking such as is required to constitute a valid adoption of a boy under the ordinary Hindu law. All that need be proved is the fact of adoption by the adoptive mother, which may be by a unilateral act. The practice of adoption amongst *devdasis* has nothing to do with religious benefit but is purely a custom arising out of a natural desire of the women of the class to have a daughter to look after them in their old age and receive their property after their death. The adoptive girl does not acquire any right by adoption in the ancestral property of the adoptive mother. She is, therefore, not entitled to claim a partition and a share, unless the right is based on contract or on custom having the force

of law. There is no legal objection to the adoption of two daughters by a dancing girl provided that such a practice is sanctioned by a custom of the community. Where a minor girl is taken in adoption by a dancing girl for purposes of prostitution and under circumstances as would constitute an offence under S. 373 of the Penal Code, such an adoption is invalid and confers no status upon the adoptee (A. I. R. 1939 Mad. 139).

§ 30. Dvyamushyayana* or Son of two fathers. Under Hindu law the father giving his son in adoption can enter into an agreement with the adoptive father that the boy should be considered as the son of both the natural and adoptive fathers. A son adopted under such an agreement is called Dvyamushyayana. The Bombay High Court holds that in every case of Dvyamushyayana adoption there must be an agreement to that effect, and that such an agreement must be proved in the case of the adoption of the only son of a brother as in any other case, there being no presumption that when a person adopts the only son of his brother the adoption is in Dvyamushyayana form (*Laxmi-patrao v. Venkatesh*, 41 Bom. 315). In the absence of proof of such an agreement, the adoption would be presumed to be in the ordinary Dattaka form.

The son adopted in the Dvyamushyayana form *inherits both in the natural and the adoptive families*. Conversely, it seems that relations of such a person in both the families inherit his property. Thus, it was held that on the death of an unmarried Dvyamushyayana son, the adoptive mother and the natural mother inherit equally as co-heiresses the property inherited by the adopted son from the adoptive father (*Basappa v. Gurlingawa*, 35 Bom. L. R. 75). The fact that the property in question belonged to the adoptive family would not affect the natural mother's right of inheritance to the son given in adoption in this form. As the Dvyamushyayana son is the son of two fathers, he is equally the son of two mothers. The natural mother, therefore, retains the right of inheritance to the Dvyamushyayana son

* Explain clearly what is meant by "Dvyamushyayana." X is the Dvyamushyayana son of two brothers, A and B. A dies first, leaving C, the natural mother of X. B then dies leaving his widow D. Then X dies unmarried. Who will succeed, and why? (April, 1926.)

What is a Dvyamushyayana adoption? (Oct., 1932; 1937.)

(26 All. 472). The sons of a person born after his adoption in the Dvyamushyayana form become the grandsons of the adoptive father and inherit as such (44 Bom. L. R. 333).

§ 31. **The act of giving and receiving.** An absolute necessity of every adoption in all the four castes, which does not admit of any substitute for it, is the corporeal delivery of the boy (6 Pat. 506). A mere agreement between the natural and adoptive fathers, or a symbolical transfer by exchange of deeds, even though registered, cannot constitute an actual gift and acceptance (6 Cal. 381, P. C.). The actual physical act of giving can, however, be delegated or performed later. Similarly, the adoptive parent can delegate some one to accept the child in adoption on his or her behalf (25 Bom. 551 ; A. I. R. 1942 Mad. 379). The bringing up of a child, even with the intention of giving one's property to that child and loosely describing him as having been adopted, do not constitute adoption (A. I. R. 1940 All. 134). Where there is no evidence of the giving and taking, a mere declaration by the adoptive father to the effect that he had adopted a son is not sufficient (54 Mad. 440). The Hindu law does not require that there shall be a formal ceremony when the boy is given and accepted. For a valid adoption all that the law requires is that the natural parent shall be asked by the adoptive parent to give his son in adoption, and that the boy shall be handed over and taken for the purpose (A. I. R. 1942 Mad. 395). It is not necessary that the adoptive parent shall make a declaration of the acceptance of the child in adoption in order to make the adoption valid. The clasping of the boy by the adoptive mother to her breast can have no other meaning than that she was taking him in adoption (A. I. R. 1942 Oudh 490). Where there was a giving and receiving of the boy during the lifetime of the husband, the widow has the right of completing the adoption by the performance of the *datta homam* ceremony after his death (A. I. R. 1942 Mad. 395).

According to Baudhayana, a smriti-writer, "One should go to the giver of the child and ask him, saying, 'Give me thy son'. The other answers, 'I give him'. He receives him with these words, 'I take thee for the fulfilment of my religious duties. I take thee to continue the line of my ancestors.'" It has been held that the utterance of these words is not necessary (A. I. R. 1942 Mad. 395).

§ 32. **Ceremony.** † Among the three regenerate classes, that is, the Brahmins, the Kshatriyas and the Vaishyas, to validate an adoption there must not only be the giving and taking but the performance of *datta homam* also ; but if the parties belong to the same gotra, the latter ceremony may be dispensed with (*Hari-das v. Narayandas*, 42 Bom. L. R. 283). It is, however, not necessary that the *datta homam* ceremony should take place simultaneously with the giving and taking. It is sufficient if the ceremony is performed even after a considerable interval. The ceremony, when performed, relates back to the giving and taking (49 Mad. 969). *Datta homam* is not necessary in the case of the Sudras (A. I. R. 1943 Cal. 613). It is not necessary in any caste in the Punjab (A. I. R. 1943 Pesh. 47). This ceremony consists in the formal act of giving and receiving in the presence of consecrated fire. Performance of *datta homam* is not essential to the validity of the adoption of a daughter's son by a Brahmin (A. I. R. 1939 Mad. 849).

§ 33. **Free consent.** Every valid adoption implies the free consent of the parties : the free consent of the persons giving and receiving in adoption, and also of the person adopted, if he is a major. Hence, if the consent is not free, being obtained by misrepresentation, coercion, fraud, undue influence or mistake, the adoption is voidable at the option of the person whose consent was so obtained. But he can ratify such an adoption, if he can do so without prejudicing the rights of third persons. The mere fact that the person giving in adoption receives pecuniary consideration does not render the adoption invalid.

§ 34. **Results of Dattaka adoption.*** (1) The adopted son is transferred from the family of birth to that of adoption

† State how far the performance of *Datta Homam* is necessary to validate an adoption. (Oct., 1938 ; 1940.)

* State the results of a valid adoption. Clearly explain the difference, if any, between an aurasa and an adopted son under the Hindu law. (Oct., 1927.)

Elucidate : " According to Hindu law an adopted son occupies the same position in the family of the adopter as a natural-born son except in a few instances". (April, 1930.)

Discuss the legal effects of a valid adoption, and state the circumstances under which a Hindu widow cannot make a valid adoption. (April, 1942.)

and loses all rights in his natural family (34 Bom. L. R. 1332). Adoption does not sever the tie of physical blood relationship but it completely transfers the adopted son to the adoptive family as regards legal relationship. Consequently, a son who leaves his own family and enters by adoption into a different family ceases to be a sapinda of his former relations and ceases to be a gotraja sapinda of any of them (*Harihar v. Bajarang*, 39 Bom. L. R. 1014, P. C.). He cannot, for instance, succeed to his natural relations; conversely, his natural relations cannot claim his estate in the adoptive family. Thus an adopted son cannot succeed to his natural maternal grandfather's property (25 Bom. L. R. 813). Nor can his natural brother succeed to the adopted brother's estate in the adoptive family (3 Luck. 76, P. C.). The adoptive parents and not the natural parents are the lawful guardians of an adopted minor (A. I. R. 1943 Mad. 273). As regards marriage and adoption, however, he retains all the ties and disabilities of blood that existed before the adoption, just as if no such adoption had taken place. He cannot, therefore, marry in his natural family within the prohibited degrees, nor can he adopt from that family a boy whom he could not have adopted, if he had remained in the family.

(2) "The rights of an adopted son, unless curtailed by express texts, are in every respect the same as those of a natural born son" (48 Mad. 1). He acquires full rights of inheritance in the adoptive family exactly like a natural born son, both in the paternal and maternal lines, even though either of the adoptive parent may be dead at the date of his adoption; these relations, in their turn, are entitled to inherit his property (10 I. A. 138; 33 Cal. 947; 46 Bom. 541). An adopted son does not acquire full rights of a natural born son in the following two cases: (a) where he is adopted by a disqualified heir (*vide* Ch. XI), he is entitled to maintenance only; and (b) where a natural son is born in the adoptive family after his adoption, his share diminishes (*vide* below).

Although for certain purposes (e.g., marriage in his natural family within the prohibited degree), the blood relationship of an adopted son remains real and binding after the adoption, nevertheless, due to the strict theory of Hindu law, adoption is in a real sense, and not merely figuratively, a *new birth*. The theory involves the principle of an entire severance and expulsion of the child adopted from his original family,

and his complete substitution into the adoptive family as if he were born into it. The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with it (*Nagindas v. Bachoo*, 40 Bom. 270, P. C.). "An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate; the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)" (*Manu*).

Ceremonially, the adopted son becomes new born in the family of his adoptive father only so as to be qualified to provide efficaciously the offering of which the dead have need, by first dying in the family of his birth, out of which he is given in adoption and in which his offerings will be no longer efficacious. It is not merely the ceremonies for the natural father, who has given, or for the adoptive father, who has taken, a son in adoption that are involved but those for the ritual number of the ancestors, paternal and maternal, that are involved (*Gajraj v. Subhadra*, 3 Luck. 76, P. C.).

(3) Where a married person is taken in adoption, which can be done only in the Bombay Province, his wife, any child in the womb at the time of adoption, and children born subsequently, pass with him into the adoptive family, but not those who were born before the date of adoption (33 Bom. 669; 34 Bom. L. R. 1332).

(4) As a general rule, property vested in the son previous to his adoption is not divested from him by his adoption. This is the Dayabhaga law. Thus it has been held that adoption does not divest property vested in the adopted son by inheritance, gift or any mode of self-acquisition prior to his adoption (56 Cal. 1135). The Madras High Court's view of the Mitakshara law is similar to the above (29 Mad. 437). The Bombay High Court has held that a share obtained by a person on partition is not divested by his adoption (47 Bom. 542). But where property is vested in a person *as an heir* of his father's separate property, he loses his rights in such property on his adoption, which passes to his own next heir in the natural family (40 Bom. 429; *vide* 34 Bom. L. R. 1332).

(5) In the Mitakshara joint family, he becomes a coparcener with his adoptive father from *the date of adoption* and has the same rights in the joint family as a natural born son would have. Where the adoption is made by the widow of a deceased coparcener and the coparcenary exists at the date of the adoption,

the adopted son becomes a member of the coparcenary and takes his adoptive father's interest in the coparcenary. In a case governed by the Hindu Women's Rights to Property Act, 1937, he would share this interest with his adoptive mother half to half. If before the adoption, the family property has devolved on an heir of the last surviving coparcener, he would divest the heir and take the whole of the family estate. If before the adoption the surviving coparceners have come to a partition, the adopted son is entitled to have the partition re-opened and recover the share of his adoptive father under the fresh partition.

(6) The adoptive father's power of disposing of his separate property by will or gift will not be affected, except where the boy is given on an express understanding that he should not do so (19 I. A. 108).

(7) When he is adopted by a widow, the adoption would divest the estate of his adoptive father vested in her, subject to the widow's right of maintenance, and he would be entitled to question unauthorised alienations of the widow made prior to adoption. An adoption by a widow after the death of her natural or adopted son, who dies without leaving behind him his own widow or son, has the effect of divesting the adoptive mother of the estate inherited by her from her son (7 Bom. 225 ; 11 Bom. 381). This is a special rule, for, under ordinary law, as the widow adopts the son to her husband, the adopted boy would be a brother of the deceased son, and as between the mother and a brother, the mother is the preferential heir (*vide*, § 96). This rule applies also to the Dayabhaga law, though under that law in no circumstances a brother has a preferential right over the mother (A. I. R. 1940 Cal. 241). In a Mitakshara joint family, a brother takes his deceased brother's share in the family property by right of survivorship to the exclusion of the mother. But her *stridhana* would not be divested. For other cases of divesting, *vide* § 35, clauses 4 and 5.

(8) Once an adoption is complete, it cannot be cancelled.

(9) The adopted son cannot renounce his status or recover his rights in the natural family. He can, however, give up his rights in the property of the adoptive family, the effect being that

the inheritance would go to the next heir (57 Cal. 1322 ; 19 Bom. 239).

Son born after adoption. When after adoption, a natural son is born to the adoptive father, the rights of the adopted son *in the adoptive father's property* are not the same as those of the natural born son. (1) On a partition between the after-born natural son and the adopted son, the latter does not take an equal share, except in the case of the Sudras in Bengal and Madras. In the case of the three higher castes, the adopted son takes $\frac{1}{3}$ in Bengal and $\frac{1}{4}$ in Madras. In Bombay, he takes $\frac{1}{4}$, *in all the castes* and in Benares $\frac{1}{4}$.

(2) In the case of an impartible estate, only the after-born natural son would succeed to the entire exclusion of the adopted son. The adopted son would be entitled to maintenance only. Thus, the after-born natural son takes the watan property of the father to the exclusion of the adopted son (*Shahebgouda v. Shid-dangouda*, 41 Bom. L. R. 333, F. B.).

(3) On the birth of a natural son, the adopted son loses the right of performing the religious ceremonies.

It should be remembered that the rule of a lesser share to an adopted son in the presence of a natural son applies only to the succession and partition of the property of the adoptive father. So far as *collateral* succession is concerned, the adopted and the natural sons stand on an equal footing and get an equal share (51 Mad. 493).

Changes introduced by the Hindu Women's Rights to Property Act, 1937. Under this Act, the widow (or if there be more than one widow, all the widows jointly) of a Hindu dying intestate after the commencement of this Act (*i.e.*, 14-4-1937) is entitled in respect of his separate intestate property to the same share as a son has, and in the case of a Mitakshara joint family, the widow is entitled to have in the property the same interest as he himself had. Hence where the widow in the enjoyment of her husband's separate estate as his heir makes an adoption, her interest in it would dwindle to a half share but she would retain that half share and the adopted son would divest her only of the other moiety. Under the Mitakshara law, on adoption by the mother, she and her adopted son would each be entitled to a half share in

her husband's undivided coparcenary interest. Under the Act, there is now no question of the interest or share of the deceased coparcener (husband of the adopting widow) passing to his surviving coparceners, and being subject of a subsequent partition between them or on the death of the last surviving coparcener descending to his heirs on succession. As the Act does not apply to a mother, it would seem that if the family estate had vested in the son before the passing of the Act, and the mother inherits it as the heir of the son, it would be wholly divested on a subsequent adoption by her.

Right to question alienations. An adopted son's rights in the property of the adoptive family date from the date of adoption and do not relate back to the death of the adoptive father except in the case of unauthorised alienations by the widow made for a purpose not binding on the estate. He would be bound by the alienations made prior to adoption to the same extent as a natural born son would be. Thus he would be bound by the valid contracts or dispositions of property made by the adoptive father before his adoption (45 Bom. 434 ; 49 All. 579). Though the adoptive father's right to will away separate property will not be affected by adoption, his right to dispose of by will ancestral property will be taken away, except when the assent to the provisions of the will was made a condition of the adoption (31 Bom. L. R. 1246).

*As regards alienations made by the widow prior to the adoption, the adopted son is bound by them if they are within the powers of the widow, *e.g.*, if they are for legal necessity or with the consent of the next reversioners (*vide* Ch. XIII). If the alienation is beyond her powers, the alienation is valid only to the extent of the widow's interest in the estate up to the date of adoption. After the adoption the alienee has no right to the property as against the adopted son. The adopted son need not wait for the death of the adoptive mother to impeach the unauthorised alienation of the widow, and may enforce his rights to property alienated before his adoption, without first proceeding to have

* In what cases may an adopted son impeach alienations made by the widow of his adoptive father prior to his adoption? (Oct., 1941.)

it declared that the alienation is not binding on him (48 Bom 654). A second adopted son has the right to set aside unlawful alienations made by his adoptive mother between the death of the first adopted son and his own adoption (49 Bom. 604 ; 8 All. 319 ; A. I. R. 1941 Mad. 699). But a second adopted son does not get a fresh cause of action to challenge unauthorised alienations of the widow made prior to the first adoption (43 Bom. L. R. 222)

§ 35. The general rule about divesting of estates.

* The general rule is that an estate once vested cannot be divested by subsequent events. Law always favours the early vesting of property. When an inheritance falls vacant, it passes to the next heir at the time, without waiting in expectation of the birth of a preferable heir. On the birth of such a person the property vested in a person, who was the nearest heir at the time, cannot be divested from him (*Gordhandas v. Mancover*, 26 Bom. 449).

The above rule about divesting of estates is subject to the following exceptions :—

(1) Where the estate of a Hindu has vested in a person who was his nearest heir at the time of his death, it is divested on the birth of a preferable heir who was *conceived* at the time. In Hindu law a son conceived is regarded for all practical purposes as a son born, the only exception being that a man is not prevented from adoption even though his wife may be pregnant to his knowledge.

(2) Where an estate has vested in the widow as an heir to her husband and the widow remarries, the estate would be divested from her and would go to the next heirs of her husband.

(3) When a person belonging to one of the three regenerate classes adopts a religious order, his property would go to his heir.

† (4) In cases governed by the Mitakshara law, where the husband was divided at the time of his death, adoption by a

* Explain briefly : "An estate once vested cannot be divested by subsequent events." (April, 1929 ; 1944.)

† State cases where an estate of inheritance is divested by a widow's adoption, and also cases where an adoption will not have the effect of divesting such estate. (Oct., 1931 ; April, 1933.)

widow divests the estate in the following cases : (a) the estate of her husband which vested in her as heir on his death ; (b) the estate of a son or grandson which vested in her on his death leaving her as his nearest heir ; (c) the estate of her husband which vested in a co-widow jointly with her, whether the co-widow was a consenting party to the adoption or not ; (d) in Bombay, the estate of her husband vested in another person if the adoption is made with that person's consent (*Payapa v. Appanna*, 23 Bom. 327).

(5) If the husband was joint at the time of his death, the share of her husband vested in her husband's surviving coparceners would be divested, when the adoption is made under an authority from her husband, or with the consent of the father-in-law or of the surviving coparceners, and in cases governed by the Mayukha even when the adoption is made without such authority or consent.

§ 36. **Agreement curtailing rights of an adopted son.** When the adopted son is a *major*, he may, by an agreement with the adopting widow made before the adoption, consent to a limitation of his rights. Thus, if the adopted son is a major and capable of contracting, there is nothing illegal in the widow requiring the adopted son to pay her debts. He may even give a share of the estate instead of paying the debts himself, and the adoption will not be invalid as being made from corrupt motive if there be debts to be paid and the share of the property given is not disproportionate to the debts, so that the Court cannot treat it as a device to divide the estate with the adopted son and under the guise of adoption to get a large share of her husband's estate to herself (51 Mad. 893). The adopted son would be bound by his agreement with the widow not because the widow had power to impose such a condition on him but because he himself entered into an agreement in lieu of consideration, *viz.*, the agreement to adopt him (A. I. R. 1926 All. 194).

*In the case of a *minor*, only an arrangement whereby the

* How far are arrangements, made between the adopting father or adopting widow and the natural father of a minor boy at the time of adoption, whereby the adopting father or mother was either to be allowed to enjoy the property for his or her lifetime, or to dispose a

widow of the adoptive father is to *enjoy his property during her lifetime, or for a less period*, is valid, when that arrangement is consented to by the natural father before the adoption. Such an arrangement has been upheld on *the ground of custom*, established by the consensus of judicial decisions. The natural father cannot enter into any other arrangement, or consent to any other disposition curtailing the rights of the adopted son, so as to bind him after the adoption. But such an agreement is not void, but merely voidable, and may be ratified by the adopted son on his attaining majority. The adopted son acquires a present and immediate interest by virtue of adoption in the property inherited by the adopting widow from her husband, or in the joint family property in the hands of the adopting father, and the natural father has no *locus standi* to curtail his interest by any other arrangement (*Krishnamurthi v. Krishnamurthi*, 54 I. A. 248). The High Court of Madras has held that an agreement between the adopting mother and the natural father whereby a *portion* of her husband's estate is settled upon her for her absolute use and enjoyment with powers of alienation is valid and binding on the adopted son, *if the agreement is fair, reasonable and beneficial to him* (52 Mad. 113). An agreement by the natural father of a minor boy, which goes beyond allowing the adoptive widow to enjoy the property during her lifetime and curtails the full rights of the adoptee in the property which becomes his on adoption is not valid in law (39 Bom. L. R. 1069). The widow cannot be given unlimited power of alienation of her husband's property for the period of her life (40 Bom. L. R. 443).

† In *Krishnamurthi v. Krishnamurthi*, their Lordships dwelt fully on the subject as to what value should be ascribed to the consent by the natural father and on what principle his consent should be allowed to validate arrangements curtailing the rights of the adopted son. Their Lordships held that (1) the consent of the natural father as such cannot affect the rights of the boy, for those rights do not arise until after

portion of it by gift or will to a near relative or stranger, valid according to Hindu law? (Oct., 1927 ; April, 1928)

Discuss the principles governing the validity of agreements made between the adoptive and natural parents of the adopted son relating to his rights of inheritance on adoption. Within what limits are such agreements held valid and binding on the adopted son? (Oct., 1930.)

† Write short note on : *Krishnamurthi v. Krishnamurthi*. (April, 1937.)

his rights as a natural father become non-existent. (2) It is impossible to ascribe any value to the guardianship power of the natural father to bind the son to property in which the son cannot have any interest until the time when he is adopted, when the adoptive and not the natural father would be his guardian. (3) Nor can the case be solved by the doctrine of approbate and reprobate, for the doctrine assumes election and the adopted son has no election. He cannot undo his adoption and be as he was before the adoption. (4) The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional. Their Lordships eventually held that the only ground, on which an agreement as mentioned above is valid, is that *such an agreement is sanctioned by custom established by the consensus of judicial decisions*.

§ 37. Invalid adoption and its effects. An adoption is invalid in the following cases :

- (1) simultaneous adoption of two sons ;
- (2) adoption of the same boy by two persons ;
- (3) adoption where any of the three capacities, *viz.*, capacity to take, capacity to give and capacity to be taken in adoption, is wanting ;
- (4) absence of valid giving and receiving ;
- (5) adoption of an orphan, where there is no custom allowing it ; and
- (6) adoption voidable on account of fraud, misrepresentation, *etc.*, when avoided by the party prejudiced.

* As a general rule, it may be said that where there has been an adoption in form, but such adoption is invalid, the adopted son does not acquire any rights in the adoptive family, nor does he forfeit any rights in the natural family (*Bawani v. Ambabai*, 1 Mad. H. C. 367). There are, however, cases in which a person whose adoption proves invalid cannot revert to his natural family. In cases of this character, his position is peculiar ; he forfeits his rights in his natural family, and all that he is entitled to in the adoptive family is maintenance. These cases are : (1) where the adopted son belongs to any one of the twice-born classes and has been invested with the sacred thread in the adoptive family, or where he is a Sudra and has undergone the ceremony of marriage

* What are the rights of an invalidly adopted son (1) in the adopted family and (2) in the natural family? (April, 1923.)

What are the effects of an invalid adoption? (April, 1938)

in the adoptive family ; (2) where there has been a valid giving and receiving, but the adoption is invalid on some other ground, as where the boy belongs to a caste different from that of his adoptive father. An invalidly adopted son can, however, take the benefit of a family arrangement made in his adoptive family on the basis of his adoption before his adoption is declared invalid.

In case an adoption proves invalid, a gift or a bequest made to him in his capacity as an adopted son would be invalid. The question whether the gift or bequest is an absolute one or a conditional one, must be decided from the intention of the donor or the testator to be gathered from the deed or will and the surrounding circumstances. If the intention was to benefit the person designated (*persona designata*), irrespective of the fact whether he fulfils the character of an adopted son or not, the gift or bequest is absolute. If the belief that the donee or the legatee is a validly adopted son was *the reason and motive, and indeed a condition of it*, it will fail, if there is no adoption at all or the adoption is subsequently declared invalid (*Fanindra Deb v Rajeswara*, 11 Cal 463).

§ 38. Acquiescence in invalid adoption. The invalidity of an adoption cannot be remedied by the subsequent consent of the persons affected by the adoption. "The fact that the adoption was recognised and acted upon cannot make that which was invalid under Hindu law valid" (*Basangouda v. Rudrappa*, 30 Bom. L. R. 596). It is only when acquiescence can be pleaded as estoppel (*vide*, Sec. 115 of the Indian Evidence Act) that a party would be precluded from impeaching an adoption so acquiesced in (54 All 169). The doctrine of estoppel applies in cases of adoption, if there is (1) a long course of acquiescence by the members of the adoptive family and (2) it is impossible to restore the adopted boy to his original situation in the natural family. Mere active participation in the ceremony (37 Mad. 529), or an erroneous expression of opinion on the legality of an adoption (*Dhanraj v. Sonibai*, 52 I. A. 231), cannot operate to create an estoppel. The disqualification arising from estoppel is purely personal (39 I. A. 142) ; nor does it validate an invalid adoption, though the persons interested in the adoption may be prevented from questioning it (A. I. R. 1944 Bom. 40).

The doctrine of laches does not apply as periods of limitation for suits regarding questions of adoption are prescribed by the Limitation Act. A suit for a declaration that an alleged adoption is invalid, or never in fact took place, must be brought within six years from the date when the alleged adoption comes to the knowledge of the plaintiff (Limitation Act, Sch. 1, Art. 118). A suit to obtain declaration that an adoption is valid must also be brought within six years from the date when the rights of the adopted son as such are interfered with (Art. 119).

§ 39. ***Kritrima Adoption.** The Kritrima form of adoption prevails in Mithila, *i.e.*, in Bihar and adjoining districts, and among the Nambudri Brahmins, where it exists side by side with the Dattaka form.

The special features of an adoption in this form are :

(1) Either a man or a woman can adopt in this form, provided he or she has no son, grandson, or great grandson, in existence.

(2) A wife or widow so adopting does not, however, require the assent of her husband or his kinsmen. She can, however, adopt only to herself, but not to her husband, even if she receive his permission.

(3) A husband and wife can adopt jointly or they may adopt separate sons in this form.

(4) Except that the adopted son must belong to the same caste as the person adopting him, there is no restriction as to the person to be adopted.

(5) The consent of the adopted son is necessary in this form, and hence he must have attained the age of discretion.

(6) No ceremonies are necessary and no particular form is required to be observed.

(7) A person adopted in this form does not lose his rights of inheritance in his natural family. In the adoptive family, he is entitled to succeed only to the person adopting him, but not to his lineal or collateral relations.

* Explain clearly what is meant by "Kritrima" adoption. (April, 1926.)

Differentiate between the Dattaka and Kritrima forms of adoption, and state in what parts of India the latter is in vogue. (Oct., 1937.)

In the Kritrima form of adoption the adopted son does not lose his connection with his own family. If, therefore, it be proved that the adoptee as a result of his adoption did in fact cease to have any connection with his natural family, it would be a factor in favour of the contention that the adoption was in the Dattaka form (A. I. R. 1933 Pat. 165).

§ 40. Doctrine of Factum Valet and its application of the Hindu law of Marriage and Adoption. *The maxim "*quod fieri non debuit factum valet*" (a thing which ought not to have been done may nevertheless be perfectly valid when it is done) finds its place in the Hindu jurisprudence, its equivalent in the Hindu law being, "a fact cannot be altered by a hundred texts." This doctrine, known as the doctrine of *factum valet*, is applied to cure defects in a thing which has already taken place. The doctrine was first enunciated by Jimutavahana, the author of the Dayabhaga, but it applies equally to the Mitakshara school (5 I. A. 40). The doctrine is applied principally in questions relating to marriage and adoption.

Where an act is done or completed in contravention of certain texts of law, such act will nevertheless be valid, provided the texts contravened are merely directory and are not in their nature mandatory. What is inculcated as a moral precept cannot be taken as a legal rule or injunction, so that an act done in contravention of a moral injunction cannot be regarded as invalid. In other words, a distinction must be drawn between what the law regards as essentials of an act or a transaction and what as its non-essentials, and that non-compliance with the rules in the matter of non-essentials will not render the act or transaction invalid. The doctrine of *factum valet* does not itself help us in differentiating a precept which is merely directory from a precept which is mandatory : this distinction has to be drawn by independent reason-

* Discuss the doctrine of *factum valet* as applied to marriage and adoption in Hindu Law. (April, 1925 ; Oct., 1938.)

Discuss the maxim "A fact cannot be altered by a hundred texts" in the application to Marriage and Adoption under Hindu law. (Oct., 1929.)

Write short note on : Doctrine of 'factum valet'. (April, 1942 ; 1943.)

ing and by the application of the Hindu rules of interpretation, viz., the rules of the Mimamsa.

The doctrine, therefore, can be invoked to remedy the defect, when the non-compliance is with a text which is construed as *merely recommendatory*, and the failure to comply entails merely religious or moral *guilt* on the *doer*, but does not vitiate the act itself. "Many things which ought not to be done in points of religion or morals are valid in point of law" (*Sri Balusu v. Sri Balusu*, 22 Mad. 398). The doctrine has no application when the textual requirement is *mandatory*. Where a *sine qua non* to a transaction is not complied with, the *factum valet* principle is wholly inapplicable. The attempt to do the act under such circumstances is a mere nullity (12 Bom. H. C. 364). Thus, it has been *held* that the text directing that a girl should be given in marriage by the guardian for marriage is to be regarded as merely recommendatory, and a duly solemnised marriage would not be set aside on the ground of the want of consent of such guardian (*Khusalchand v. Bai Mani*, 1 Bom. 247). The doctrine of *factum valet* applies to marriages, if (1) the marriage rites are duly performed, (2) there is no impediment to the marriage in the shape of gotra or prohibited degrees of relationship or difference in castes, and (3) there is absence of proof of force or fraud (A. I. R. 1937 Cal. 214). The adoption of an only son, or of the eldest son, or of a stranger in preference to a relative, has been upheld, though repugnant to the Sanskrit texts which are however regarded as merely recommendatory. Such matters do not affect the essence of adoption, but merely to the *modus operandi* of adoption. But the texts regarding capacity to take, capacity to give and capacity to be given in adoption have been held to be *mandatory*, and an adoption made in contravention of the provisions of these texts is invalid (*Sri Balusu v. Sri Balusu*, 22 Mad. 398). Thus the adoption of an illegitimate son, as the capacity to give him in adoption is lacking in the mother who gave him in adoption, cannot be validated by the doctrine of *factum valet* (A. I. R. 1944 Bom. 40).

CHAPTER IV.

MINORITY AND GUARDIANSHIP.

§ 41. **Age of Majority.** According to Hindu law, a person attains majority on the completion of *the 16th year*, except in Bengal, where the age of majority is fixed on the completion of the 15th year. This rule of Hindu law continues to apply to the Hindus in matters relating to *marriage, dower, divorce and adoption*; in other matters, the Hindus are governed by the Indian Majority Act, under which a person attains majority on the completion of the 18th year. But a minor of whose person or property a guardian has been appointed or declared under the Guardians and Wards Act, and every minor, whose property is under the superintendence of a Court of Wards, attains his majority under the Act on the completion of his 21st year. The Hindu law of majority would be modified by the Child Marriage Restraint Act, so as to fix it at 18 for males and 14 for females, so far as *the right to contract a marriage* is concerned.

§ 42. **Guardianship.** The Guardians and Wards Act saves from its operation the personal law of the Hindus, so far as it relates to any power to appoint a guardian of a minor's person or property or both, and recognises the predominant claims of the father and the husband, whom it is not competent to a Court to appoint, because they are the natural guardians. But the Court's power of removing a guardian, in case of unfitness, is not affected.

§ 43. **Kinds of Guardians.** Guardians may be divided into (1) natural, (2) testamentary, and (3) certified or those appointed by the Court

A natural guardian is one who derives his status merely from his relationship to the minor.

A testamentary guardian is one who is nominated by the father by word or writing, the nomination taking effect after his death. The father is unrestricted in his choice and may exclude even the mother from the guardianship (*Deba Nand v. Anandmani*, 43 All. 213). This right is peculiar to the father alone ;

no other relation, not even the mother, has a right to appoint a guardian of her minor child.

A guardian may be appointed by a District Court or by a chartered High Court.

Besides these legal guardians, there are what are called *de facto guardians*, i.e., those who, without any legal title, look after the minor's property and generally act in his interests for the time being. There must be a continuous course of conduct as a guardian of the minor to enable one to become a *de facto* guardian. The rights of a *de facto* guardian are the same as those of a natural guardian (6 M. I. A. 393). Therefore a *de facto* guardian of a minor can validly sell or mortgage the property of the minor for legal necessity or for the benefit of the estate (26 Cal. 820 ; 49 Mad. 768 ; 34 Bom. L. R. 1483, F. B., overruling 49 Bom. 576). A *de facto* guardian, however, cannot bind the property of the minor by entering into contracts as distinguished from making an alienation of the property (44 Bom. L. R. 894). A fugitive or an isolated act of a person with regard to the minor's property would not make him a *de facto* guardian. Such a person is merely a guardian *ad hoc* and has no right to make an alienation (51 Bom. 1040).

Where a Hindu minor is the sole owner of an ancestral business and goods are supplied to his *de facto* guardian in usual course of business and which are necessary for carrying on that business, the minor is bound to make good the price of the goods out of his estate (A. I. R. 1941 Nag. 105 ; 41 I. C. 35 ; A. I. R. 1940 Lah. 205). A Hindu cannot act as a guardian of his minor brother or cousin (25 All. 407). If he happens to be the *karta* of a joint family, his description of himself as a guardian of his minor brother or cousin in a sale deed executed by him on behalf of himself and the minor must be characterised as erroneous and the sale may be upheld if within his rights as the *karta* (A. I. R. 1943 Mad. 103).

§ 44. Natural Guardians. The father, and in his absence the mother, is the natural guardian of the *person and separate property* of his minor sons and unmarried daughters. No other relation is entitled as of right to the guardianship of a minor. Failing the father and mother, any other relative must derive his title from the Court. (A. I. R. 1940 Mad. 33, F. B.).

The right of the father is absolute, even though he himself may be a minor ; and in his lifetime, a Court has no power to

appoint another as a guardian of his minor children, except in cases where the Court finds the father unfit to be the guardian. Where a boy is adopted, the right of guardianship over him on adoption passes from his natural parents to the adoptive parents. On marriage, a minor girl passes under the guardianship of her husband. The father loses his right if he renounces the world, or ill-treats his child, or acts in a way injurious to its interest or morals, or when he waives his right and allows another to maintain and educate the minor so that it would not be for its welfare to alter its mode of life (*Besant v. Narayaniah*, 41 I. A. 314).

So long as the father is living, he is entitled to the guardianship of his minor children, however young they may be, in preference to the mother. On the death of the father, the mother is entitled to the guardianship of the minor children in preference to the paternal relations. When the family is undivided, the surviving coparceners (*i.e.*, members of a joint Hindu family) would, no doubt, be entitled to hold possession of the family estate, but this would not affect the right of the mother to the guardianship of the person and separate property of the minor. A mother's right would be lost in case (1) the father has appointed another as a guardian for the children, or (2) the mother has changed her religion and it is not in the interest of the minor to remain in her custody (14 M.I.A. 309). A widow does not, on remarriage, lose her right of guardianship, though she will not then have a preferential claim to be appointed before other relations (15 Lah. 15).

In the case of the illegitimate children it has been held by the Lahore High Court that neither the mother nor the putative father is the lawful guardian and that though in a competition between the mother and a third person, the mother might be preferred (12 Mad. 67, 16 Bom. 307), as between the mother and the putative father, the putative father, on whom the obligation to maintain the children falls should *prima facie* have a preferential right to custody (15 Lah. 630).

*Change of religion.** (1) By father. The mere fact that the father has changed his religion is no reason for depriving him of the custody of his children (25 Bom. 551). But if at the time of conversion, the

* State how far change of a religion by (i) a Hindu parent, (ii) a Hindu minor, affects the parent's rights of guardianship in Hindu law. (April, 1941.)

father voluntarily abandons his parental rights, and entrusts the custody of his child to another person in order that it may be maintained and educated by him, the Court will not restore back the custody of the child to the father, if such a course would be detrimental to the interests of the child. In such a case the Court should be guided by what it conceives to be best for the welfare and well-being of the child (25 Cal. 581). (2) By mother. Under ordinary circumstances, a child must be presumed to have its father's religion, and his corresponding civil and political status; and it is therefore, ordinarily, the duty of a guardian to train his infant ward in such religion. Therefore, where a Hindu mother changes her religion, the Court may, if it is in the interest of the minor, remove the child from the custody of the mother and place it under a Hindu guardian (*Skinner v. Orde*, 14 M. I. A. 309; A. I. R. 1937 Mad. 976). (3) By minor. Where a Hindu child becomes a convert to another religion and leaves his parents, the question whether it should be restored to the custody of its parents has to be decided by what the Court conceives in the particular case to be for the welfare and interest of the child (16 Bom. 307; 23 Cal. 290; 12 All. 213).

Guardianship of interest in joint family. Where a minor is a member of a joint family, the manager of the family is entitled to the management of the whole joint family property, including the minor's interest in it. A guardian of the joint family property cannot be appointed by a Court because the minor's interest in it is not defined (20 All. 407; A. I. R. 1941 Nag. 199). It is, therefore, to be assumed that the appointment of certified guardians of minor members implies that *ipso facto* the minor members are being separated from the adult members (A. I. R. 1933 All. 180). But when all the coparceners are minors, a High Court in its inherent jurisdiction may appoint a guardian of the *whole of the joint family property* until one of them attains majority (30 Bom. 152). When one of the coparceners arrives at the age of majority the Court must hand over the joint family property to him. But only a chartered High Court has the power to appoint a guardian of a minor's *undivided interest* in a joint family, and not a Court acting under the Guardians and Wards Act. Thus it was held that the Bombay High Court has *inherent* jurisdiction to appoint a guardian of the undivided share in the joint family property of a minor, when there are no adults in the family, and such an appointment will extend the period of minority to the completion of the 21st year of the minor (*Narsi v. Sachindranath*, 31 Bom. L. R. 1009).

*** Powers of natural guardian.** The natural guardian of a minor has the following powers, provided he exercises them *in his capacity as guardian* and not on his own behalf :

(1) The power, in the management of the estate, to mortgage or sell the whole or part of the estate, in *cases of necessity* or *for the benefit of the estate* (*Hunooman Persaud's case*).

(2) The power to enter into a contract and do all other acts which are for the benefit of the minor or protection of his estate. A guardian, however, cannot bind a minor's estate by a contract for the *purchase of immoveable property*, nor can he bind him by entering into a *personal covenant*, though contracted for a legal necessity, so that specific performance of the contract cannot be decreed against the minor (39 Cal. 232, P. C.; *vide* 56 All 142). The mere fact that the minor enjoys the use of money, borrowed by his guardian, would not bind him. The guardian, however, has power to contract loans on behalf of the minor for the latter's necessities and benefit, and although the guardian can not impose any personal liability on the minor, the estate of the minor is liable for such a debt (12 Pat. 112).

A natural guardian has authority to contract simple debt without charging the estate for necessary purposes of the minor or his estate, and such liability is binding on the minor's estate (A. I. R. 1939 Mad 538). The paternal grandmother is not a legal guardian but may be a *de facto guardian*. If she has passed a promissory note as a *de facto* guardian of the minor, it is not binding on the minor's estate even though the promissory note was passed in renewal of former notes executed by the minor's father (44 Bom L. R. 894).

(3) The power to acknowledge a debt, so as to extend the period of limitation, provided such an acknowledgment is for the benefit of the minor's estate. But a guardian has no right to revive a time-barred debt (99 I. C. 215).

(4) The power to enter into family settlement on behalf of the minor, provided it is in the nature of a *bona fide compromise* of doubtful claims.

* What are the powers of a natural guardian of a Hindu minor? Under what circumstances can a guardian be appointed of minor's interest in the joint family property? (Oct., 1924.)

Discuss the rights of the natural guardians of a Hindu minor. (April, 1942.)

What is necessity and benefit of the estate. "The power of the Manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly *in a case of need, or for the benefit of the estate. . . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it*, in the particular instance, is the thing to be regarded." (*Hunooman Persaud v. Mussamat Babooee*, 6 M. I. A. 393). The same principles are extended to alienations made by (1) a widow, (2) the manager of a joint Hindu family and (3) the Shebait of an idol.

The touch-stone of the authority is necessity, which implies not actual compulsion, but the kind of pressure, which the law recognises as sufficient and serious. Necessity connotes the idea of warding off an evil or doing of something which cannot be avoided. It involves some notion of *pressure from without* (*Ragho v. Zaga*, 31 Bom. L. R. 361).

Benefit of the Estate. Ever since the judgment in *Hunooman Persaud's* case was pronounced, the terms 'necessity' and 'benefit of the estate' have been used side by side. It is obvious that anything which is a necessity to the estate must be of benefit to it. But the question is, whether the term 'benefit of the estate' enlarges the scope of the power of alienation beyond the cases of necessity, and this question has given rise to conflicting views. The term 'benefit of the estate' would seem to import something positive done to enlarge or improve the estate, not a merely negative act such as the discharge of debts or the averting of disaster (Mayne's Hindu Law and Usage, 1922, 9th edition pp. 476-7). In *Hunooman Persaud's* case, the Privy Council observed, "Where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate." This would suggest that the term 'benefit of the estate' covers all acts which a prudent owner would do in connection with his own estate. The question was considered by the Privy Council in *Palanippa v. Devasikamoney* (44 I. A. 147). That was a case of a grant of a permanent lease by a *Shebait* of *debottar* lands, and the Privy Council treated the powers of such a *Shebait* as being on the same footing as the powers of a manager of a minor's estate. In this case, their Lordships observe, "No

indication is to be found... as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise description of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits." It is obvious that all the acts enumerated in this passage would be dictated by necessity in the strict sense. Further on, their Lordships observe, "The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not. No authority has been cited for giving any countenance to the notion that a *shebait* is entitled to sell *debottar* lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the *debottar* land itself."

These passages have given rise to the conflicting views as stated above. The Bombay view was that a transaction cannot be said to be for the benefit of the estate unless it is of a *defensive character calculated to protect the estate from some threatened danger of destruction*. The Allahabad view is that for a transaction to be for the benefit of estate *it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time* (1928, 50 All. 969, F. B.; dissenting from three earlier cases where the view taken was the same as the Bombay view mentioned above). Thus, in *Ganpat v. Sabli* (1908, 32 Bom. 577) where the question was of a sale by a Hindu widow, the Bombay High Court held that the necessity to justify such a sale should be one involving some pressure from without and not merely a desire to better or develop the estate. In the next case *Vishnu v. Ramachandra* (1923, 25 Bom. L. R. 508), the question was of a sale by a manager of a joint Hindu family, some members of which were minors, and it was held that the sale could not be justified merely on the ground that it appeared at the time to be advantageous, that is to say, that it was a sale for what appeared to be a good price. In the last case of this series (*Ragho v. Zaga*, 1928, 53 Bom. 419), the question was of a sale by the father as the manager of his

minor son's property, and Patkar, J., observed that the benefit to the estate must be of a protective character and that term does not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return and would not imply vast powers of management which might amount to an authorisation to embark on speculative ventures. There is, however, an earlier decision, which apparently appears to be inconsistent with the three decisions mentioned above, but is really not so. A joint Hindu family owned several houses, one of which was in such a dilapidated condition that the Municipality required it to be pulled down; the adult coparceners sold it, but it was not shown that the circumstances of the family were such as to make the sale absolutely necessary. Still, however, the sale was *held* to be justifiable. Looking at this decision from the point of view that the property in question had either to be sold or else destroyed, the sale came very near to a case of necessity, and hence it is not inconsistent with the other decisions (*Nagindas Maneklal v. Mahmud Yusuf*, 23 Bom L. R. 1094).

In a recent full bench decision (*Hemraj v. Nathu*, 1935, 37 Bom. L. R. 427), the Bombay High Court reviewed the earlier decisions of the Court as well as the Allahabad decisions representing the contrary view, and observed that the Allahabad view went too far and that there is no justification in Hindu law for saying that the manager of a minor's estate can sell the minor's property solely on the ground that if he were the owner of the property he would as a prudent man sell it. "I may point out that the question whether a transaction is for the benefit of the estate or not *involves the consideration of something more than merely whether the purchase price paid is a good price; it involves the further question of what is to be done with the purchase money...* To sell a piece of land for a very good price would not be beneficial if the purchase money was to be invested in an insolvent business. However, apart from that consideration, in my opinion, the manager of a minor under Hindu law is not entitled to sell merely for the purpose of enhancing the value of the property of the minor, or for increasing the minor's income. On the other hand, I am not prepared to go quite so far as Mr. Justice Patkar went in *Ragho v. Zaga Ekoba*, and to say that no transaction can be for the benefit of the minor, which is not of a character to protect or preserve

property of the minor. It would generally, I think, be difficult to justify a sale not of that character, but I can conceive of cases not of that character in which the facts might nevertheless be of such a compelling character that any Court would hold the transactions to be for the benefit of the estate, *e.g.*, the sale of land which could not conveniently be cultivated with other property of the minor, and the investment of the purchase money in lands which could be conveniently cultivated, assuming of course that the price obtained, and the price paid, were proper; or the sale of lands in order to raise money to secure irrigation or permanent improvement of the other lands of the minor; or a beneficial exchange; or a case like the one in *Nagindas Maneklal v. Mahomed Yusuf*, where it was necessary to sell in order to prevent the destruction of the property" (*per* Beaumont, C. J.).

During the minority of the plaintiff, his mother, acting as his guardian, sold a strip of land belonging to the plaintiff worth Rs. 600 to the defendant, who owned lands on the two sides of the plaintiff's land and who paid a special price of Rs. 900 for consolidating the three pieces of land and building a house on the site. The purchase money was invested by the mother in the money lending business of the family. It was held that the sale was not binding on the plaintiff and that he was entitled to have his property back subject to his returning Rs. 900, the purchase price (*Hemraj v. Nathu*).

The Allahabad High Court has, however, held that in order to sustain an alienation of joint family property by the managing member or a guardian of a Hindu minor, the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him and is *not limited to the transactions which are of a defensive nature* (50 All. 969 F. B., see also A. I. R., 1930 Lah. 679). So also the Patna High Court has held that the term necessity is not to be understood in the sense of what is absolutely indispensable, nor actual compelling necessity is to be the sole test of the validity of an alienation by the manager of a joint Hindu family. If it can be shown that the transaction as a whole is beneficial to the family, the transaction will be held to be valid and binding on the other members (7 Pat. 798; A. I. R. 1939 Pat. 97).

Burden of Proof. The onus lies on the alienee to prove either (1) that there was legal necessity in fact which would justify the alienation, or (2) that he made a proper and *bona fide* enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. If he fails to prove that there was a necessity in fact, the alienation may still be upheld if he proves that he made enquiry as to the existence of the alleged necessity, and that the facts represented to

him were such as, if true, would have justified the transaction. If he discharges this burden, he is not bound to see that the money paid by him is actually applied by the alienor to meet the necessity (*Atma Ram v. Sadhu Singh*, 40 Bom. L. R. 742, P. C. ; A. I. R. 1939 Mad. 538).

Limitation. A transfer by a guardian, however improper it may have been, is not a void transaction but only a voidable one and when property cannot be recovered without avoiding it, Art. 44 of the Limitation Act, prescribing the period of limitation of three years from the date when the ward attains majority, applies. Hence when a person sued to recover the properties, which his mother had alienated as his *de jure* guardian during his minority, but the suit was filed more than three years after he attained majority, though within twelve years of the alienation, it was *held* the suit was barred by limitation (1936, 59 Mad 549).

§ 45. Testamentary Guardians. The power of a testamentary guardian to deal with the minor's property is subject to the restrictions, if any, imposed by the will.

It is not competent to the only adult coparcener of a Hindu Mitakshara family to appoint *by will or otherwise* a trustee, guardian or manager of the coparcenary property of a minor coparcener during his minority (*Brijbhukandas v. Ghashiram*, 37 Bom. L. R. 1., F. B.; 41 Mad. 561, F. B). "It is of the essence of Hindu law in cases governed by the Mitakshara school, that on the death of one coparcener the joint property vests in the surviving coparceners, and the deceased coparceners have no interest in the property and no power of disposition over it. If that is so, it is difficult to see on what principle he is at liberty to appoint somebody to manage the joint property" (*ibid*). Under the Dayabhaga law, as it is competent to a Hindu to dispose of the property even if he has a son, he can make such an appointment (13 M. I A 209).

§ 46. Guardians appointed by the Court. A Court, if it is satisfied that a guardian should be appointed of the person or property of a minor in the minor's interest, may make such an order. In appointing the guardian of the person of a minor, the Court should be guided by what, consistently with the personal law of the minor, appears in the circumstances to be for his welfare. If he is old enough to form an intelligent judgment, his wishes should be consulted. The interest, well-being and happiness of the minor ought to be the main and paramount consideration in selecting the guardian of the person of a minor. A guardian can only be appointed of the minor's separate property, but a chartered High Court may, in the exercise of its inherent jurisdiction, appoint the manager to be the guardian of the minor's undivided

interest. A guardian appointed by the Court has no power to alienate the minor's property without the previous permission of the Court. A guardian appointed under the Guardian and Wards Act can acknowledge a debt to the same extent as a natural guardian can.

§ 47. **Remedies for the custody of ward.** (1) Where a minor is within the limits of the ordinary original jurisdiction of the High Court of Calcutta, Madras, or Bombay, the guardian can apply for the custody of his ward by a writ of *Habeas Corpus*. (2) Where a child is confined in such a way that the confinement amounts to an offence, sec. 106 of the Code of Criminal Procedure applies; sec. 552 of the same Code relates to the case of a female child under 14 years detained for an unlawful purpose. (3) A guardian may sue for the custody of his ward from a person, who is in wrongful possession of him. (4) A guardian may petition for the restoration of the custody of his ward under sec 25 of the Guardians and Wards Act.

CHAPTER V.

MAINTENANCE AND RESIDENCE.

§ 48. **Nature of the right of maintenance.** The right of maintenance does not rest upon contract. It is a liability created by Hindu law and arises out of the jural relation of the parties. It is a non-transferable right. If, however, the amount of maintenance was fixed by an agreement or by a decree, it was held to be assignable (5 Bom. 99). Now under the amended Transfer of Property Act even in these cases it cannot be transferred. "A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred" (Sec. 6, cl. *dd*, amended Transfer of Property Act). A right to future maintenance, or an interest in the income of immovable property assigned by way of maintenance, cannot be attached in execution of a decree (Code of Civil Procedure, 1908, Sec. 60). But the arrears of maintenance can be attached and sold. Debts must be paid before a right of maintenance can be claimed (14 Lah 399; 17 Lah. 588).

§ 49. **Two kinds of liability.** The liability of a Hindu to maintain others is of two kinds: (1) *personal*, when it arises merely from the relationship of the parties; (2) liability, *dependent on possession of property*. The personal liability is limited to maintaining the wife, minor sons, unmarried daughters, and aged parents. "The aged parents, a virtuous wife and an infant child must be maintained even by doing a hundred misdeeds" (Manu). The second kind of liability applies to the manager of a joint Mitakshara family and the heir of a separated member. The manager is under a legal obligation to maintain all male members of the family, their wives and children. When a person has succeeded by survivorship to the share of his deceased coparcener, he takes it subject to the burden of maintaining the widow and unmarried daughters of the deceased coparcener (40 Bom. L. R. 422). The duty of maintaining the widow devolves on the person who takes the property of the deceased undivided member of the family and the duty is dependent on the taking of the pro-

erty. Hence when the widow of a coparcener sues for maintenance after the family has become divided, her claim is only against the coparcener to whom her husband's share has been allotted (46 Bom. L. R. 399).

Under Hindu law an heir is legally bound to provide out of and to the extent of the estate, which descends to him, maintenance for those whom the late proprietor was legally or morally bound to maintain, the reason being that the estate is inherited subject to obligation to provide for such maintenance (5 Lah. 375; A. I. R. 1943 Oudh 190). This liability descends on the heir of such heir.

§ 50. * Persons entitled to maintenance.

(1) *Aged father and mother*, but not grand-parents. Mother does not include step-mother.

†(2) *Legitimate sons*, during their minority.

(3) *Adult sons* (a) out of ancestral property under the Mitakshara law, but not under the Dayabhaga; (b) in the case of the Bombay school, where a son cannot sue for partition when his father is joint with his father or other collaterals (46 Bom. 435); (c) adopted sons, in the case of invalid adoption; (d) illegitimate adult sons, under the Mitakshara law, but not under the Dayabhaga law; and (e) adult sons, even capable of maintaining themselves, in the case of an impartible estate.

Though the father is not under an absolute obligation to maintain his adult son, he is bound as the manager of the family to maintain him as a member of the family (*Chanvirgouda v. District Magistrate of Dharwar*, 29 Bom. L. R. 52).

The general rule is that a member of an undivided family cannot sue for maintenance, his proper remedy is to sue for partition, in case maintenance is denied to him. Where, however, a member of a joint family cannot file a suit for partition, without the consent of certain members of that family, he can sue for maintenance out of the family property, if he is driven out of the family (46 Bom. 435). According to the Madras High Court every adult coparcener can sue for maintenance and is not bound to sue for partition (A. I. R. 1940 Mad. 664).

* Who are entitled to maintenance under Hindu Law? (Oct., 1922.)

† Is there an obligation on a Hindu father to maintain his adult and minor sons and daughters? Can a Hindu coparcener in a joint family bring a suit against his father and uncle for separate maintenance and marriage expenses? (March, 1922)

(4) *Disqualified persons*, i.e., persons excluded from inheritance or a share on partition, and their wives and children.

* (5) *Concubine (Avaruddha Stree)*. A concubine cannot claim maintenance from her paramour during his lifetime, because the latter can discard her at any time. But, after his death, if she was faithful to him till his death, she acquires a right of maintenance as against his estate, whether ancestral or self-acquired (3 Bom. L. R. 647). The subsistence to which she is entitled includes residence, and not merely food and raiment. A concubine kept by a man for a number of years and then discarded is not entitled to maintenance, nor one with whom a Hindu has only had casual intercourse. A concubine's right of maintenance is conditional on her chastity. A concubine is entitled to maintenance even though she was not kept in the family house of the deceased, provided the concubinage was continuous till the death of the paramour (50 Bom. 604).

(6) *Junior members* of an impartible estate.

† (7) *Illegitimate sons*, whether major or minor, born of Hindu mothers. An illegitimate son among the three regenerate classes is entitled only to maintenance out of his father's coparcenary property as well as out of his well-acquired property. An *adult* illegitimate son is not entitled to maintenance from the separate property of his putative father. The father is bound to maintain him only if he is possessed of some joint family property (A. I. R. 1942 Mad. 419). Among the Sudras, illegitimate sons are entitled to maintenance, if they cannot inherit or get a share on partition (33 Bom. L. R. 1526). According to the Dayabhaga law, the right of an illegitimate son against his father ceases on his attaining majority. The right however, is purely *personal* and does not descend to the legitimate issue of a deceased illegitimate son. An illegitimate son's right is not affected by the fact that he is the result of a casual connection or adulterous intercourse. If the mother is not a Hindu, the right cannot be enforced under Hindu law. The illegitimate son can, in that case, proceed against the putative father under Sec. 488 of the Code of Criminal Procedure

* Discuss the right of a permanently kept concubine of a Hindu to maintenance from the estate of her lord after his death. (Oct., 1922.)

† Discuss the legal status of (1) a widow, (2) a mistress and (3) an illegitimate son under Hindu law. (April, 1929.)

(8) *Unmarried daughters.* If the father dies, the daughters, if unmarried, have a legal claim for maintenance out of the father's estate. This right extends to the joint family property in the hands of the surviving coparceners after the father's death. The married daughters must seek maintenance from their husband's family. If a married daughter is unable to obtain maintenance from her husband, or after his death, from his family, her father, if he has got separate property of his own, is under a *moral* obligation to maintain her. But it is not settled whether, after the father's death, she acquires a legal right to be maintained by his heirs out of his estate. The Calcutta High Court has held that she does (28 Cal. 278), the Bombay High Court that she does not (*Bai Mangal v. Bai Rukmini*, 23 Bom. 291). *Illegitimate daughters*, even though unmarried, have no remedy under Hindu law. They are, however, entitled to maintenance under Sec. 438 of the Code of Criminal Procedure, which right, however, is enforceable only during the lifetime of the putative father and terminates with his death.

The obligation which Hindu law imposes on the father exists only when the reciprocal duty is observed by the daughter, that is, when she submits to the care and custody of the father and obeys him in all respects. It is open to the children to refuse to obey the parent if the latter has been proved to be vicious, cruel and immoral. It is also open to the father to waive his right in favour of some other person. But so long as the father is not shown to be incompetent to maintain and look after the interests of the children, refractory daughters residing with their maternal grand-father on the death of their mother and refusing to go to live with the father, though he is ready and willing to maintain them, are not entitled to a decree for maintenance (*Kusum v. Krishnaji*, 41 Bom. L. R. 446).

(9) *Wife*, so long as as she is chaste and remains under his roof and protection or lives apart for a just cause (*vide infra*).

(10) *Chaste widow* (*vide infra*).

(11) *Daughter-in-law* If the father-in-law has received some property by survivorship, in which his son had a vested interest he is under a *legal* obligation to maintain his son's widow. But where he has not got any such property the obligation is only a *moral* one. The moral obligation is converted into a legal obligation against the person who inherits the property of the father-in-law (4 Luck. 491 ; 61 Cal. 221). Thus it was held that the

mother-in-law was bound to maintain the widow of a predeceased son, who had lived in union with his father, out of the latter's self-acquired property to which the mother-in-law had succeeded as heir. But if the father-in-law has bequeathed by will or gifted away his self-acquired property, then the daughter-in-law has no right of maintenance, against the devisee or donee of the father-in-law even though the devisee or donee be also the next heir of the father-in-law (*Bhagirathibai v. Dwarkabai*, 35 Bom. L. R. 44).

(12) *A woman*, whose marriage has been dissolved under the Native Converts' Marriage Dissolution Act (*vide* § 15). Where a marriage has been dissolved under this Act at the suit of the husband, who has become a convert to Christianity, the Court may by its decree order the husband to make such allowance to his wife for her maintenance, during the remainder of her life or until her remarriage.

A mother-in-law has no personal right of maintenance against her daughter-in-law. Where a widow sued the widow of her predeceased son for maintenance, and the only property in possession of the defendant was the proceeds of her own Stridhana and the family house, which was occupied by the plaintiff and defendant, it was held that the defendant was not liable for maintenance (8 Bom. 15). So, also, there is no legal obligation to support a step-mother independently of the existence, in the hands of the step-son, of the family property. It must be remembered that the grand-father is under no personal obligation to maintain his grandchildren.

Wife's right of maintenance. According to Hindu law, the maintenance of the wife by the husband is a matter of personal obligation, arising from relation, quite independent of the possession by the husband of any property, ancestral or self-acquired (2 Bom. 573). But it does not mean that she has no right to be maintained out of her husband's property, if he possesses any. Her right of maintenance during her husband's lifetime is in a way higher than after his death, since in the latter case it depends upon the property left by him. A wife can pursue her husband's property in the hands of a stranger, and under the amended section 39 of the Transfer of Property Act, bare notice of the existence of the right is sufficient to make her maintenance

a burden on the property in the hands of the transferee. But debts contracted by a Hindu take precedence over the right of maintenance of his wife or infant child. Hence a purchaser of property sold to discharge the debts of a husband acquire a good title against a wife who seeks to charge it with her maintenance, unless the charge was created prior to the sale (A. I. R. 1949 Bom. 50). It is the duty of the husband to provide his wife with food, raiment and other things incidental to her position in life. Mere loss of caste does not destroy the right. A Hindu who has abandoned Hinduism must, however, maintain his wife (4 Mad 243).

As a general rule, a wife is not entitled to *separate* maintenance from her husband, unless she proves that, by reason of his misconduct, or refusal to maintain her in his own place of residence, or other justifying cause, she is compelled to live apart from him. The following have been held to be such justifying causes :

- (1) The fact that the husband keeps a concubine in the house.
- (2) The husband habitually treating her with cruelty and such violence as to create the most serious apprehension as to her personal safety.
- (3) The husband renouncing Hinduism.
- (4) Abandonment of the wife, even without proof of cruelty.
- (5) The fact that the husband is suffering from a loathsome disease, such as leprosy (45 Mad. 812). But the fact that a husband married a second wife, while his first wife was living, cannot justify the latter in claiming separate maintenance. So also a wife, who voluntarily leaves her husband without his permission and lives with her own family, cannot claim maintenance from her husband. But by this act, she does not forfeit her right against his estate after his death. Even during her husband's lifetime, she can return to him and claim maintenance from him. When a wife subsequent to her obtaining a decree for maintenance against her husband resumes cohabitation with him, the decree becomes ineffective and cannot be enforced. If she is compelled to leave him after resuming cohabitation she should apply for a fresh decree (A. I. R. 1942 Mad. 1).

The first duty of a Hindu wife is to submit to her husband's authority and stay under his roof, and not to quit his house without any

adequate or justifying cause. If the husband by reason of his misconduct or cruelty or by his refusal to maintain her or for any other justifying cause makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she then becomes entitled to separate maintenance and residence, provided there is no reasonable doubt about her chastity at the time she seeks the relief. Desertion is not capable of judicial definition. There must be clear evidence of the intention on the part of one of the spouses to break off matrimonial relations with the other. To constitute wilful desertion on the part of the husband his absence and the cessation of cohabitation must be in spite of the wish of the wife, and she must not be a consenting party to it (38 Bom. L. R. 77). A post-nuptial agreement between husband and wife to live separately and the husband setting apart a portion of his estate, out of which the wife agrees to receive maintenance is not opposed to public policy or the spirit of Hindu law (39 Bom. L. R. 458).

In the case of an unchaste wife, if she repents and performs expiatory ceremonies, she must be maintained by her husband. According to the Sanskrit texts, a wife can be abandoned for the purposes of conjugal rights and ceremonies only when she commits adultery with a man of low caste, or commits any sin considered as deadly by the Shastras, such as killing a Brahmin. But even in these cases, the wife must be kept, though apart, in the house, and given sufficient food and clothing to keep body and soul together (*Parami v. Mahadevi*, 12 Bom. L. R. 196). This is called *bare or starving* maintenance. It is only when a wife continues and persists in her unchaste life that she forfeits her right even to this *starving* maintenance. The above principles apply to the case of a widow also. The texts relating to maintenance refer to women generally and are not confined to wives only (55 All. 392). Where a Hindu widow, who had been unchaste, was proved to have given up the life of unchastity, she was held entitled to a bare maintenance (*Bhikubai*, 49 Bom. 459 : *vide* also 59 Mad. 658 ; 1934, 56 All. 392). Similarly, a widow, who had become unchaste but has subsequently reformed herself and returned to a chaste life is entitled to a bare or starving maintenance from the persons who are in possession of the estate which was jointly held by them and the deceased husband of the widow. There is no authority which says that a widow once unchaste must be deemed unchaste for ever and must for ever forfeit her

* How far is unchastity a bar to maintenance in the case of Hindu females? (Oct., 1929 . April, 1933.)

claim to even a bare maintenance, although she reforms and gives up leading an immoral life (56 All. 392).

*** Widow's right of maintenance.** A Hindu widow has a right of maintenance, whether she has a son or not, and she must turn to the family of her husband for it. A Hindu cannot so dispose of his property by will as to affect the right of maintenance to which a person is entitled under Hindu law, nor can he gift away the entire property so as to defeat the right of maintenance of his wife or widow (5 Bom. 99). A widow, who does not succeed to the estate of her husband, is entitled to maintenance out of her husband's separate property, or out of the property in which he was a coparcener at the time of his death. So also she would be entitled to maintenance out of the property to which she had succeeded as her husband's heir, but which is divested from her on adoption. As a general rule, a widow has no absolute right of maintenance against the relations of her husband, unless they have the ancestral or self-acquired property of the husband in their hands (*Savitribai v. Luxmibai*, 2 Bom. 573, F. B.). A widowed mother, however, has an absolute right of maintenance from her son, and in case of his death, out of his property. This exception does not extend to the case of a step-son, who is liable only if he has inherited property from his father or grandfather. A widow is not entitled to claim any specific share of the income which is attributable to her husband's share. All that she is entitled to is an allowance sufficient for her maintenance (A. I. R. 1924 Mad. 216).

Widow's right of residence. As a general rule a Hindu widow is entitled to reside in her husband's family house. Her right of subsistence or maintenance is not confined to food and raiment, but includes the right of residence. A natural or an adopted son cannot turn his father's widow and other females of the family, who are entitled to maintenance, out of the dwelling house, selected by the father for his own residence and in which he left the females of the family at the time of his death, until at least some other place is provided for them.

A widow, however, can be ousted from the family dwelling house in the following cases :—

* Discuss shortly a widow's right of maintenance and residence under Hindu law. When can such right be defeated? (Oct. 1924.)

(1) Where the family house has been sold for the purpose of satisfying debts incurred for the family. The purchaser can oust the widow in spite of notice of her claim, because the debts of the deceased person must have priority over his widow's right of residence. In the absence of proof that such debts were incurred in fraud of the widow's right, or that they were not incurred for family benefit, an auction purchaser buys the property free from the widow's right of residence notwithstanding notice of her claim (*Manilal v. Tarabai*, 11 Mad. 260). Where a trading family was adjudicated insolvents, the family business failing owing to a heavy fall in prices and the debts having been incurred in the ordinary course of business by the manager, it was held that the whole family property was liable for the payment of the debts and the rights of the widow to maintenance and residence must be postponed to the payment of the debts (1935, 15 Lah. 9).

(2) Where a family consists of a husband and wife, the wife cannot assert her right of residence in the family dwelling house either against a purchaser in execution of a decree passed against her husband in his lifetime, or against his estate after his death, or against a purchaser under a private sale from her husband without necessity, though the purchaser had notice at the time of the sale that she was residing in the house (45 Bom. 337). The reason is that the right of a widow comes into existence only on the death of her husband, and then she must take her rights in the property as it stands at that time. She cannot challenge the alienations made by the husband during his lifetime.

There is a distinction between an alienation made by the husband himself and an alienation made by any other person of the husband's family. In the former case the widow is not entitled to challenge the alienation. In the latter case, however, her right to challenge the alienation depends upon its nature and the capacity of the person making it. A widow is entitled to challenge debts incurred by a coparcener, such as a son or brother of her husband, and to enforce her rights to property sold to pay off debts, unless it is proved that they had been incurred for family necessity (45 Bom. L. R. 259).

(3) Another case is that of a *bona fide* transferee for value, within the meaning of the provisions of Sec. 39 of the Transfer of Property Act. A person may transfer his property to a *bona fide* purchaser for value so as to deprive a widow of her right of maintenance or residence against such property, provided the *trans-*

feree has no notice of the right. If he has notice of the right, no question of intention arises under the amended Transfer of Property Act. Under the old section, what was material was that the transfer must not be made with a view to defeat the right, or if it was so made, the transferee should not have notice of such intention.

“Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred (with the intention of defeating such right), the right may be enforced against the transferee, if he has notice (of such intention) thereof, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands,” Sec. 39, the Transfer of Property Act. (The words in brackets have been omitted by the Amending Act of 1929).

Where a Hindu widow is *allowed* by her husband to reside in one of the family houses, the residence is only a right given to her and not an obligation imposed upon her. If she elects not to live in the house, she does not thereby forfeit her interest in her husband's estate by deed or otherwise (37 Bom. L. R. 849, P. C.).

Although the Shastras impose on a Hindu widow the duty of living with her deceased husband's relatives, the duty has been regarded by the British Courts as merely a moral one, the non-compliance with which will not deprive a widow of her right of maintenance (4 Bom. 261). The general rule of Hindu law, therefore, is that a Hindu widow is not bound to reside in her deceased husband's family house, and that she does not forfeit her right to maintenance out of her husband's estate merely by going to reside elsewhere (58 Cal. 745; 44 Bom. L. R. 527). Nor is it necessary that she should have been actually residing with her husband at the time of his death (15 Lah. 591). Exceptions have been made in the following cases: (1) A widow residing elsewhere for unchaste or immoral purposes. (2) Where the husband has directed that his wife ought to be maintained in the family house. But in this case, if there is a sufficient reason, *e.g.*, if the husband's relations are endeavouring to blacken the character of the widow by falsely imputing unchastity to her, the widow can live apart from her husband's relations (13 Bom. 218). (3) Where the family property is too small to admit of an allotment of separate maintenance.

Loss of Widow's right of maintenance. The widow has no right of maintenance in the following cases :

(1) If she had once received sufficient allotment for her maintenance, which she has since dissipated.

(2) A widow, by remarriage, forfeits her right of maintenance out of the property of her first husband. But the Allahabad High Court has held, that the Hindu Widow's Remarriage Act does not apply to the case of a widow, who is allowed to remarry according to the custom of her caste, and hence she does not forfeit her right of maintenance out of the estate of her first husband by remarriage (31 All. 161).

(3) If a widow is living apart from her husband's family for immoral or improper purposes, or if she is unchaste. The right of a Hindu widow to maintenance is conditional upon her leading a life of chastity. She loses that right if she becomes unchaste (*Lakshmi Chand*, 37 Bom. L. R. 849, P. C.). In the case of an unchaste widow, the same principles apply as in the case of an unchaste wife. In the case of an unchaste widow, the right would be forfeited, even though it has been secured by a decree of the Court or by an agreement of the parties (*Kisanji v. Lakshmi*, 33 Bom. L. R. 610). But where a special agreement, by way of compromise of her claim to succeed to her husband's property, has been entered into with a Hindu widow for payment of her maintenance, or where the maintenance is given by a will, the widow would not, upon proof of unchastity, forfeit her right to such maintenance, unless such condition has been made a term of the agreement or it is expressly provided in the will that it would be so forfeited (26 All. 321 ; *Parami v. Mahadevi*, 34 Bom. 278). So also a grant by the husband, which is not for maintenance, but a grant of a different character, e.g., a gift out of love and affection which he bears to her, is not affected by her subsequent unchastity (A. I. R. 1921 Pat. 375). Where a Hindu widow is, under an instrument, given the income of an estate specially created for her, she takes a vested interest in the property which is not liable to be defeated by her subsequent unchastity, in the absence of any provision to that effect in the instrument (37 Bom. L. R. 849).

There are many ways in which a right to maintenance to which a Hindu widow is entitled and which is charged on the family property

may be satisfied : (1) The widow can, if she so chooses, live with her husband's family and be supported by them, and in that case her rights, so far as the property is concerned, are not higher than those given by section 39 of the Transfer of Property Act. Her right is not to the property itself but to the profits arising out of it. (2) Another way in which the family can discharge its obligations towards her is by assigning a portion of the property to her in lieu of maintenance. Here, again, her rights are to look to the profits and not to the property, but she can, if she so chooses, alienate her right to the enjoyment and possession of the property or any portion of it for the period of her life (54 All. 366), and if she chooses to do so, she cannot turn round afterwards and demand that she be maintained again. (3) It is also open to the widow to agree to a definite sum for her maintenance and agree that it shall be a charge upon a definite and specified portion of the family property. She, as the charge-holder, has then two remedies open to her. (i) She can ask for a receiver (47 All. 385, P.C. ; 26 Cal. 441), or (ii) she can bring the property or a portion of it for sale on obtaining a decree. If the execution sale is made not subject to the charge, the charge for subsequent years is extinguished so far as the property sold is concerned, and the auction purchaser is not liable to pay out of the property the maintenance allowance subsequent to the period covered by the decree (A. I R. 1939 Nag. 1).

§ 51. * Amount of maintenance. Mahmood, J., has held that the Courts, in determining the amount of maintenance, must bear in mind that Hindu widows are, by custom, debarred from remarriage, and that they must, therefore, fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality (12 All. 558). In fixing the amount of maintenance, provision must be made for the reasonable wants of the widow, namely, for the performance of charity and discharge of religious obligations, in addition to reasonable provision for her food, raiment and lodging, having regard to the amount of the estate which is liable for her maintenance, to her position in life, and to the circumstances of the family. The following, therefore, should be taken into consideration :—

(1) the value of the estate as gauged by the annual income derivable therefrom ;

(2) the position and status of the deceased husband of the claimant ;

(3) the position and status of the widow ; and

* On what basis is the amount of maintenance of the widow of a member of a joint family to be determined? (March, 1922.)

(4) the expenses involved in the religious and other duties which she has to discharge, *e.g.*, expenses incidental to the funeral ceremonies of her husband, as well as expenses necessary for such religious ceremonies as should properly be performed.

The right of maintenance is conferred on the widow under Hindu law in lieu of her husband's share in the joint family property and it cannot be taken away by the fact that she has some property of her own, either productive or non-productive of income. Her separate property or income therefrom should not be taken into account in assessing the amount of maintenance to be awarded to her (A. I. R. 1940 Mad. 547). A widow's maintenance should be fixed, having regard to the income of the estate and the present circumstances of the family, at a sum which would enable her to live as far as may be, consistently with the position of a widow, in something like the same degree of comfort and the same reasonable luxury of life as she had in her husband's lifetime, and neither on too penurious or miserly nor on too extravagant a scale (*Ekradeshwari v. Homeshwar*, 31 Bom. L. R. 116, P. C. ; 36 Bom. L. R. 230). The ordinary rule is that the maximum allowance which a widow of a deceased coparcener should get would be an amount equal to the income of her husband's share in the property (A. I. R. 1939 Mad. 37). Where the provision for maintenance made by the husband in his will in favour of his widow and minor daughters is inadequate, it is within the power of the Court to substitute a more reasonable provision (A. I. R. 1939 Mad. 586). But where the husband by his own free will chooses to diminish his estate by giving away part of it to charity, his widow is not entitled to maintenance in proportion to what the income was before the charitable gift or bequest was made (41 Bom. L. R. 787). The principles upon which maintenance is allowed to a widow are to be applied *mutatis mutandis in the case of other females*.

An illegitimate son is not entitled merely to a compassionate maintenance, and the Court should not be niggardly in determining the quantum of his maintenance (A. I. R. 1929 Mad. 545). But the illegitimate son cannot get as maintenance a share higher than the share of the income to which he would have been entitled as an illegitimate son. Thus, where the lower court fixed the amount at Rs. 1,000 on an income of Rs. 2,000 per annum, it was reduced

to Rs. 500 being equal to 1/4th share to which the illegitimate son would have been entitled (33 Bom. L. R. 1082 ; A. I. R. 1939 Mad. 614).

The amount of maintenance to be awarded to a concubine in continuous keeping should cover the expenses for her establishment and clothing. The value of the property is not the sole criterion, but regard must be had to the extent of property, to the manner of the woman's life and the way in which she was treated by her paramour (*Charandas Vasonji v. Nagubai*, 31 Bom. L. R. 1128).

§ 52. Variation of the amount. In the absence of an express term to the contrary, a maintenance allowance payable to a Hindu widow under an agreement or a decree is subject to variation according to the fluctuation in the family income. An implied term has to be read into the agreement or the decree that the payment of the allowance is subject to the usual incidents of Hindu law under which the right to maintenance is dependent upon the state of family fortunes, and is liable to fluctuation both up and down in sympathy with them. There should be a material change in the circumstances, such as a substantial change in the income of the estate of the family or in the cost of living (22 Mad. 175 ; 24 Bom. 386 ; A. I. R. 1937 All. 42). It is not any and every alteration in the circumstances which will justify a variation (A. I. R. 1941 Nag. 437). But an agreement by a widow to receive a fixed maintenance and not to claim any increase in future, even in case of a change of circumstances, has been held to be binding on her (47 Mad. 308).

§ 53. Suits for maintenance. A person entitled to maintenance can resort to all or any of the following remedies : (1) A suit for declaration of the right of maintenance. Such a suit must be brought within twelve years from the time when the right is denied (Art 129, Sch. II, Limitation Act). (2) A suit for the arrears of maintenance, which must be brought within 12 years of the time when arrears are payable (Art. 128). (3) A suit to have the maintenance declared a charge upon the estate. (4) Where maintenance is fixed by an agreement, by way of a charge, it may be enforced by a suit under the Transfer of Property Act.

Arrears of maintenance. Courts dealing with claims of arrears of maintenance have a very large discretion to grant or withhold those

arrears with special reference to the urgent need and necessities of the widow (44 Bom. L. R. 527). If it be shown that the widow was in want at the time at which she was entitled to maintenance, the Court may give her arrears of that period (A. I. R. 1939 Nag. 130). To justify a refusal of the grant of the arrears, there should be proof of circumstances which might prove waiver, abandonment or estoppel (57 Mad. 1003). The absence of a demand for a long period will not deprive a widow of her right to the arrears, although that circumstance may be taken into consideration in determining the extent of the liability to be imposed for arrears due for a long period (A. I. R. 1937 Mad. 915). To arrears of maintenance the same principles apply as to future maintenance, but the Court is not bound to award the arrears at the same rate as may be considered reasonable for the future (41 Bom. L. R. 788).

§ 54. How far maintenance a charge. *The maintenance of a wife or a widow is not a charge on the estate of her husband, unless it is fixed and charged upon the estate by a decree, or by an agreement between the widow and the holder of the estate, or by the will of the deceased husband. The right is one of an indefinite character, which, unless made a charge upon property, is enforceable only like any other unsecured liability and may be defeated in the same ways in which a right of residence may be lost (10 Lah. 706). But once it is made a charge, it is good against all, except the creditors of her deceased husband. Under the amended Transfer of Property Act even an unsecured right of maintenance would be good against a transferee with notice of the right.

Under Hindu law, where a person has succeeded by survivorship to the share of his deceased coparcener, he takes it subject to the burden of maintaining the widow and unmarried daughters of the deceased coparcener. The burden attaches to the property. The holder of such interest for maintenance is entitled as a matter of right to ask the Court to create formal charge on the property (40 Bom. L. R. 422).

* Is the right of maintenance of a Hindu widow a charge on her husband's estate? (Oct., 1940.)

Chapter VI.

MITAKSHARA JOINT FAMILY.

§ 55. **Nature.** The joint family system is the survival of an age when, among the ancient Aryan communities of Asia and Europe, the primary social unit was the family. But the Hindu father, instead of being, as of old, the absolute proprietor of persons and property within his power, is now regarded as the representative of the family. He is entitled to manage the property of the family, represent it in suits, incur debts and transfer joint property for the purposes of necessity. As regards the rights over the persons of the members of the family, he is now the natural guardian of all the minors in the family, can give a daughter in marriage or a son in adoption.

The normal condition of a Hindu family is jointness, not only in estate (property), but also in food and worship. Such a family system has far reaching effects on the Hindu law of property. Whereas in England, ownership is, as a rule, single, independent, and unrestricted, in India, joint ownership is the rule and will be presumed to exist in each individual case, until the contrary is shown. If an individual holds property in severalty, it will, in India, in the next generation relapse into a state of joint tenancy. Absolute, unrestricted ownership, such as enables the owner to do anything he likes with his property is the exception. A father is restrained by his sons, a brother by his brothers, a woman by her successors. If property is free in the hands of its acquirer, it resumes its fetters in the hands of his heirs (Mayne).

§ 56. **Joint Family.** A Hindu family ordinarily consists of all the descendants in the male line from a common ancestor, their wives and unmarried daughters. The fundamental principle of the Hindu family is the tie of sapindaship, without which it is impossible to form a joint family (10 Bom. L. R 184). The joint family may be broken up by the separation of individual members, or by the partition of the rights of all the members.

Such a separating or dividing member will form a new family with his descendants, so that a separation from a joint family can never be more than temporary.

Joint Family and Coparcenary. *While a joint family would comprise the whole body of persons, who can trace their descent from a common ancestor and amongst whom there has been no partition, a coparcenary includes only those persons who acquire an interest in the joint family property by birth. These are the persons who by relationship have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with debts and, at their pleasure, to enforce a partition. They are the sons, grandsons and great grandsons of the holder of the property for the time being, and the undivided collaterals, who are descendants in the male line, of one who was a coparcener with the ancestor of the last possessor. No female, not even the wife, can be a coparcener, according to the Mitakshara law. A joint family differs from a coparcenary in (i) the indefinite number of its members, (ii) the inequality of their rights, some taking an interest in the joint family property and others having a right of maintenance only, and (iii) the inclusion of females. There is thus a sharp distinction between the joint Hindu family and a coparcenary. The joint Hindu family is a wider expression than the coparcenary. A family consisting of the sole surviving coparcener and his mother and wife is nevertheless a joint Hindu family, though it would not constitute a coparcenary (37 Bom. L. R. 692). A joint family may consist of surviving female members only (A. I. R. 1938 Nag. 423).

§ 57. Constitution of a Coparcenary. The coparcenary is constituted by the common living ancestor and his male descendants up to three generations next to him, or within four degrees counting from and including such owner, *viz.*, sons, grandsons and great grandsons. A son of a great grandson is out of the coparcenary so long as the common ancestor is alive. On the death of the ancestor, he steps into the coparcenary provided his right to take by survivorship is not extinguished. This right would be extinguished, if there is a break of more than three

* What is the difference, if any, between a joint Hindu family and a Hindu coparcenary? (April, 1943.) Write short note on "A Hindu coparcenary." (Oct., 1941.)

degrees between any holder of the property and the person who claims to enter the coparcenary after his death. Thus, suppose A has a son B and a grandson C. A, B, and C are coparceners in the ancestral property in the hands of A. Next, suppose a son D is born to C, D will also be a coparcener with A, B and C, as he is 4th in degree from the common ancestor A. But if D gets a son E, E will not be a coparcener so long as A is alive. On A's death, he will step into the coparcenary of which the common ancestor will now be B. But if B, C and D had all died in the lifetime of A, there will be a break of more than three degrees between A and E, and the property on A's death will devolve by *succession* to his heirs, such as his widow, and will not go to E as his right to take by survivorship is extinguished.

It will be seen that though every coparcenary must have a common ancestor to start with, it is not limited to the descendants within 4 degrees of this original ancestor. A person may be a member of a coparcenary, even though he is more than 4 degrees removed from the original ancestor, provided he is *within 4 degrees* from the last holder. This is based upon the rule that partition can be effectually demanded by a Hindu, more than 4 degrees remote from the acquirer or original owner of the property sought to be divided, provided he is not more than 4 degrees removed from the last holder of the property, however remote he may be from the original owner thereof (*Moro Viswanath v. Ganesh*, 10 Bom. H. C 444). "It is the right to partition which determines the right to take by survivorship" (25 Mad. 678, P. C.).

Coparcenary, Joint-tenancy and Tenancy-in-common.* The two distinctive features of a Hindu coparcenary are (1) unity of *juristic existence* and (2) unity of *ownership*. By unity of juristic existence is meant, that all the coparceners are, as regards the outside world, deemed for juristic purposes as a single individual, the corporate existence not being disturbed by death of individual members. The family is a sort of a corporation having continued existence. Its constitution might change

* Explain what is meant by coparcenary property. How does it differ from joint property of the English law? (April, 1928.)

How far can joint family property be compared with joint property under English law? (Oct., 1931.)

Define and distinguish between joint tenants and coparceners. (April, 1932.)

by birth, adoption, marriage or death, but as regards strangers, it is deemed to be a single individual, a separate legal entity (A. I. R. 1942 Lah. 178, F. B.). While this is so as regards the outsiders, as between the coparceners there is complete community of interest and unity of possession. By unity of ownership (community of interest) is meant that the joint family property is vested in the whole body of coparceners, and so long as the family continues to remain undivided, no single member can say that he has a definite share, say one-third or one-fourth (*Approvier v. Rama Subba*, 12 M. I. A. 75).

These two incidents have been introduced into the joint Hindu family from the English law of Real Property. The joint tenancy of English law is a kind of co-ownership, which resembles the Hindu coparcenary in the existence of the right of survivorship and the right to put an end to the joint status by partition.

A coparcenary, however, differs in its origin and some of its characteristics from an English joint tenancy :—

(1) The Hindu coparcenary is a creation of law, arising from birth. It can never be created by an agreement between two strangers, except that a stranger on adoption becomes affiliated to the family.

(2) The male issue of coparceners take an interest in the coparcenary property by birth, while the sons of joint tenants do not acquire any such interest.

(3) The widow of a deceased coparcener is entitled to maintenance, but the widow of a joint tenant has no such right.

(4) The interest of a coparcener fluctuates with births and deaths in the family ; in the case of joint tenants, there is unity of interest, as the interest continues to be of the same intensity as from the beginning.

(5) In the case of coparceners, their title arises at different times, namely, the dates of their respective births ; in the case of a joint tenancy, the title of all joint tenants arises at the same time, *viz.*, the date of the deed, if it is created by an agreement, or the date of the death of the testator, if it is created by a will.

(6) A joint tenancy can be destroyed not only by partition

but also by an alienation of, or an accession to, the interest of a joint tenant.

The English joint-tenancy is distinguished by *four unities, viz.*, (1) unity of *possession*, (2) unity of *interest*, (3) unity of *title*, and (4) unity of *time* of the commencement of such title. In a Hindu coparcenary, there are only the unities of *possession* and *title*, as title in each case is derived from the common ancestor. But the unities of *interest* and *time* are not present in all cases.

Tenants-in-common are such co-owners of property as hold it by *several and distinct* titles, but by unity of possession. There is no right of survivorship, and on the death of a tenant-in-common, his share devolves by succession to his heirs. The members of a Dayabhaga joint family are tenants-in-common.

§ 58. Modes of Devolution. Under the Mitakshara law, the estate of a deceased male devolves in three different modes under different circumstances :—

(1) If he was a member of a joint undivided family, his interest in the joint family property passes by the right of survivorship to the surviving members

(2) If he was separated from his coparceners, and was not subsequently reunited with any of them, his estate descends according to the rules of succession. The rules of succession also apply to the *separate* property of a *member of a joint family*.

(3) If he was reunited with any of his coparceners after partition, his estate goes according to a special order of succession, as survivorship does not apply to such a case.

§ 59. Devolution by survivorship. *So long as the family is joint and undivided, the joint family property is enjoyed in its entirety by the whole family and not in separate shares by the members. Therefore an individual member has not such an interest therein as is capable of being inherited by his heirs. Inasmuch as a member could not point, during his lifetime, to a

* Comment on the statement : " Apart from the Hindu Women's Rights to Property Act, 1937, there is in the Mitakshara law no such thing as succession, properly so called, in an undivided Hindu family". (April, 1943.)

" Under the Mitakshara, there is no inheritance as such but merely partition ; and under the Dayabhaga, there is no partition but inheritance only." Comment upon this with special reference to coparcenary law and the idea of heirship under both the systems. (April, 1931.)

particular share as exclusively his own, he has no property, properly speaking, which his heirs might claim as their heritage. Hence while the joint family endures, there is, strictly speaking, no question as to succession to the property. In other words, "there is no such thing as succession, properly so called, in an undivided family" (Mayne).

The joint family is a corporation in the sense of having a continuous existence, notwithstanding the death of individual members. On the death of a member without leaving male issue, his undivided coparcenary interest (*vide* § 66, *infra*) does not pass by descent, but lapses in the joint family property. Thus deaths may enlarge the beneficial interest of the survivors by diminishing the number of those who have a claim upon the common fund, just as births may diminish their interest by increasing the number of claimants. This right of survivors of benefiting by the lapse of a deceased coparcener's interest causing an augmentation of their share at the time of partition is known as the *right of survivorship*. And this right of survivorship is the ordinary mode of devolution in the case of a Mitakshara joint family. Thus, as the Privy Council has put it, "According to the principles of Hindu law, there is coparcenership between the different members of a united family *and survivorship following upon it*. There is community of interest and unity of possession between all the members of the family and *upon the death of any of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and common possession*" (*Katama Natchiar v. Rajah of Shivaganga*, 9 M. I. A 543).

Right of survivorship when defeated. The right of the surviving coparceners to take by survivorship the interest of a deceased coparcener will be defeated in the following cases : (1) where the deceased coparcener has left male issue, they represent his right to a share on partition ; (2) where the deceased coparcener has sold or mortgaged his interest as in Bombay and Madras ; (3) where the interest of a coparcener has been attached in execution of a decree against him ; (4) where a decree has been passed in his lifetime, even though the interest has not been attached in his lifetime, if the judgement-debtor stood in the relation of a father, grand-father or great grand-father to the surviv-

ing coparceners ; or (5) where the interest of the deceased coparcener has vested in the Official Assignee on his insolvency. The right of survivorship may be given up by the coparceners. Thus, where a document, embodying a mutual agreement, supported by legal consideration, was executed, whereby each brother gave up the possibility of his surviving the other, it was held that the transaction was valid and binding (45 All. 245).

•§ 59A. The Hindu Women's Right to Property Act (XVIII of 1937 amended by Act XI of 1938). A revolutionary change has been introduced by this Act in the Mitakshara law of coparcenary by giving a death blow to the doctrine of survivorship when a coparcener dies leaving behind him his widow. "When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had" [section 2, sub-section (2)] Sub-section (3) runs as follows: "Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as the Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner".

Effect of the Act. (1) The preamble of the Act shows that the Act is passed "to amend the Hindu law to give better rights to women in respect of property". The Act is a remedial Act seeking to remove or mitigate what the Legislature presumably regarded as a mischief (A. I. R. 1941 Federal Court 72). It endeavours to improve the position of Hindu widows in two classes of cases, namely, (a) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other coparceners ; and (b) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great grandsons of the deceased who under the law take in preference. At this stage we are concerned with the improvement

* Discuss the legal effects of the Hindu Women's Rights to Property Act. (April, 1942)

in the position of Hindu widows in the case (a) stated above ; that in case (b) relates to the law of inheritance and is dealt with in Chapter IX, § 93. We may note, however, that whereas the improvement in the case (b) relates to the widows of the deceased, as well as of his predeceased sons, and of the predeceased sons of such predeceased sons, the improvement in the case (a) relates only to the widow of a deceased coparcener. The Act does not confer any new right on the widow of a predeceased son of the deceased coparcener ; or the widow of his grandsons, when both the son and the grandson had predeceased him. Hence when a coparcener dies leaving behind him his predeceased son's widow or predeceased grandson's widow the son being also dead, but not his own widow, his undivided coparcenary interest would be taken by the surviving coparceners by the right of survivorship and the widow will have only right of maintenance, if any. Again, the Act does not improve the position of the wife or the mother of a coparcener, and their rights continue as under the law before the passing of the Act.

(2) The widow of a coparcener takes the interest of her deceased husband in the joint family property. Thus, it destroys the right of survivorship of the husband's coparceners when he leaves his widow behind him. The widow, however, does not become a coparcener of the surviving coparceners in the sense that she would be entitled to their interests on their deaths by right of survivorship (A. I. R. 1943 All. 188). The widow becomes entitled to her rights under section 3 of the Act not as an heir of her husband nor by survivorship but by statute (A. I. R. 1943 All. 188 ; 246). "The effect of S. 3, cls. (2) and (3), may be regarded as a survival of the husband's persona in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances" (A. I. R. 1943 All. 246). The widow stands in the shoes of the deceased husband and continues to be a member of the joint family. If the deceased coparcener has left sons besides the widow, it does not mean that the widow excludes the sons (A. I. R. 1942 Oudh 216). The widow will then be entitled to take the same sub-share in the share of her husband's branch which her husband would have taken in case there was a partition at the moment of his death. Thus, if a joint family consists of three brothers A, B and C, and

A dies living behind him his widow and two sons, the widow and each of the two sons would be entitled to one-ninth share, being one-third of the one-third share of the branch of A.

(3) The interest which the widow takes is the limited interest known as the Hindu Woman's Estate (*vide* Chapter XIII). The Act, however, gives her the valuable right of claiming a partition of her share. Under the law prior to the passing of the Act, she was entitled as a mother to take a share when her sons came to a partition by metes and bounds. No other female sharer under Hindu law possesses the right of herself demanding a partition (*vide* § 79). There is no automatic partition of the joint family by reason of S. 3(2) but the widow can claim a partition like a male owner. So long as such partition has not been made, the status of a joint Hindu family continues and she is a member of the family. She is, therefore, capable of being represented by the karta of the family in family transactions and suits by the karta (A. I. R. 1943 All. 188).

(4) The Act does not affect agricultural land. The widow, therefore, takes her husband's interest in family property other than agricultural land (A. I. R. 1941 Federal Court 72). The widow may, therefore, take advantage of the Act in so far as properties other than agricultural lands are concerned, and so far as these lands are concerned, her right of maintenance is preserved in spite of the Act. The only proviso would be that in assessing the amount of maintenance from the agricultural property, due allowance should be made for the property which comes to the widow by virtue of the Act.

(5) The Act is not retrospective (S. 4 of the Act). It came into force on 14th April 1937.

(6) Unchastity of the widow would not be a bar to her getting her husband's interest, as under the old law, because the Act says its provisions shall apply notwithstanding any rule of Hindu law or custom to the contrary (S. 2 of the Act ; 43 Bom. L. R. 338).

Federal Court's decision. (In the matter of the Hindu Women's Rights to Property Act, 1937 A. I. R. 1941 Federal Court 72). The bill which became the Hindu Women's Rights to Property Act (Act XVIII of 1937) was passed by the Legislative Assembly of the Indian

Legislature on 4th February, 1937, that is, before Part III of the Government of India Act, 1935 (Constitution Act), came into operation and at a time when the powers of the Legislature were plenary, but it was passed by the Council of State only on 6th April 1937, that is, after Part III of the Constitution Act came into operation on 1st April 1937, and received the assent of the Governor-General on 14th April 1937. After 1st April 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of Sch. 7, Constitution Act, so far as the Governors' Provinces are concerned. Laws with respect to the "devolution of agricultural land" could be enacted only by the Provincial Legislatures. "Wills, intestacy and succession, save as regards agricultural land" appeared as entry No. 7 in List III, the Concurrent List. Doubts were, therefore, raised regarding the validity of this Act and the amending Act of 1938, and a special reference was made to the Federal Court by His Excellency the Governor-General. The questions referred were: "(1) Does either the Hindu Women's Rights to Property Act, 1937, which was passed by the Legislative Assembly on 4th February 1937, and by the Council of State on 6th April 1937, and which received the Governor-General's assent on 14th April 1937, or the Hindu Women's Rights to Property (Amendment) Act, 1938, which was passed in all stages after 1st April 1937, operate to regulate (a) succession to agricultural land? (b) devolution by survivorship of property other than agricultural land?"

"(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries of the three Legislative Lists in Sch. 7, Government of India Act, 1935?"

The Federal Court replied them as under. (1) The Hindu Women's Right to Property Act, 1937, and the Hindu Women's Right to Property (Amendment) Act, 1938, (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land.

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List 3, the Concurrent List.

It was urged before the Federal Court that if the Act should be held to be *ultra vires* in its part relating to agricultural land, it would not be permissible to sever the good from the bad, so as to allow it to operate in respect of property other than agricultural land in the Governors' Provinces. Dealing with this contention their Lordships state: "No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to word 'property' in the Act when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that

it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word 'property' as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate, that is to say, property other than agricultural land . . . The Court does not seek to divide the Act into two parts, *viz.*, that part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word 'property' as used in it, no part of the Act was beyond the Legislature's powers."

§ 60. Classification of Property. 'Property, according to Hindu law, may be divided into two classes, *viz.*, (1) joint family property and (2) separate property. The joint family property, which is of the essence of the notion of a joint family, consists of all the property in which the members have a common interest and common possession, and therefore a right of partition. Its two main incidents are that (a) it devolves by survivorship, and (b) it is the property in which the male issue of a coparcener acquire an interest by birth. The separate property, on the other hand, is in the exclusive possession of its owner, and on his death intestate it devolves by succession to his heirs.

Obstructed and unobstructed heritage. In the Mitakshara, property is said to be of two sorts, *apratibandha daya* or unobstructed heritage and *sapratibandha daya* or obstructed heritage. Where the accrual of a right to property is by birth, it is not obstructed by the existence of the owner; hence it is called unobstructed heritage. Thus property inherited by a Hindu from his father, father's father or father's father's father is unobstructed heritage as regards his male issue, as they acquire an interest in it from the moment of their birth. †But property which devolves on parents, brothers, and uncles upon the death of the owner is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right comes into existence for the first time on the owner dying without any issue: hence, the existence of a son and the survival of the owner are impediments to such succession.

§ 61. Joint family property. The joint family or coparcenary property consists of :

* State and explain the different kinds of property recognised under Hindu law. (March, 1923.)

Define clearly ancestral property, joint family property and separate property with their incidents. (Oct., 1931.)

† Explain the following term : "Obstructed heritage." (Oct., 1923.)

(1) Ancestral property, *i.e.*, property inherited from the father, father's father, or father's father's father.

(2) Property acquired by all or any of the coparceners *with the aid* of the joint family funds (34 I. A. 65).

(3) Property acquired by the *joint* labour of the members, even *without the aid* of the joint family funds, is presumed to be joint family property, in absence of any indication of an intention to the contrary (*Haridas v. Devkuvarbai*, 50 Bom. 443). This presumption may be rebutted by proof that the persons acquired the property as members of an ordinary partnership, in which case the property will be deemed partnership property. Where *some* only of the members of a joint Hindu family acquire property without the aid of joint family property, but by the joint labour such property is not joint family property, but is joint in a limited sense only, *e.g.*, it would devolve by survivorship and not by inheritance amongst the acquirers. However a son of an acquirer by birth does not become entitled to a share in it (*Nathu Lal v. Babu Kam*, 1936, 38 Bom. L. R. 462, P. C.).

(4) Property originally the separate property of a member (a) voluntarily thrown into the common stock, (b) with the intention of abandoning all separate claims on it. Such an intention need not be express; it is sufficient if the owner blends it in one general account without discriminating between the two, in such a way that a clear intention to waive his separate rights may be established (*Lal Bahadur v. Kanhaiyalal*, 24 All. 244). But acts which might have been done out of affection or from kind motives, such as allowing other members of the family to use his separate property conjointly with himself, should not be construed as a necessary indication of such intention.

(5) Accretions to joint family property, such as the income of such property, proceeds of sale of such property, and property purchased out of such proceeds or with the income or aid of such property.

Joint family property, mortgaged to a third person and redeemed by member with his own separate property, is joint family property. But if the mortgagee has foreclosed, and the property is afterwards purchased by a member, such property will be deemed to be the self-acquired property of the purchaser. The test in determining whether a particular pro-

erty is joint family property or separate property is to ascertain from what source the purchase money came. The fact that the property was purchased or settled in the name of a particular member of the family or a stranger is immaterial.

Ancestral Property. * In its technical sense, *ancestral property* means property which descends to a person in such a manner that his male issue acquires certain rights in it as against him. All property which a man inherits from a direct male ancestor, not exceeding 3 degrees higher than himself, is ancestral property, and is held by him in coparcenary with his male issue ; so also property obtained by way of a share on partition is ancestral property, as also all accretions to ancestral property. But what a man has inherited from a collateral relation, *e.g.*, from a brother, nephew, cousin or uncle, is not ancestral property, and his descendants are not coparceners in it with him. So also property inherited from a remote paternal male ancestor, such as the great great grandfather, or from a female, such as the mother, is not ancestral property. The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal line ; but the expression "ancestral estate", in which, under Hindu law, a son acquires jointly with his father an interest by birth, must be confined to the property descending to the father from his *male* ancestor in the male line. Unless the property came by descent from a lineal male ancestor in the male line, it is not deemed ancestral in Hindu law (35 I. A. 206). Hence, property inherited by a daughter's son from his maternal grandfather is his separate property and not "ancestral" in his hands in the restricted sense in which that term is used in Hindu law. Therefore, if the daughter's son has a son, the latter does not acquire by birth any interest in the property jointly with his father. The person inheriting such property from his maternal grandfather has full power of disposal over it, and a devise made by him of such property in favour of anyone he likes cannot be challenged by his son or by any other person

* Define clearly ancestral property, joint family property and separate property with their incidents. (Oct., 1931.)

What are the incidents of ancestral property in the hands of a Hindu governed by (1) Mitakshara school, and (2) Dayabhaga school? Is the property devolving on a daughter's son after the death of the maternal grandfather ancestral? (April, 1944.)

(*Muhammad Husain v. Kishna Nandan*, 1937, 39 Bom. L. R. 979, P.C.). Property inherited from a maternal uncle is not ancestral property, because of the further ground that the maternal uncle is not an ancestor (27 Mad. 300). Only the lineal male descendants acquire an interest in the ancestral property in the hands of a Hindu. Hence such property does not become the property of the Hindu undivided family by reason of his having a wife and daughters. The property is his property and the income therefrom is his income, and it is chargeable to income-tax as his income, *i.e.*, as the income of an individual and not of a Hindu undivided family (39 Bom. L. R. 374, P. C.). The only effect of the distinction between ancestral and self-acquired property is that a Hindu son acquires an interest in ancestral property by birth but he does not acquire any such interest in self-acquired property. If a Hindu has no son, even ancestral property in his hands is his separate property, in the sense that he may alienate it before such time as a son is born to him (A. I. R. 1942 All. 331).

* The Privy Council has held in an early case that property inherited from a *maternal grandfather* by the daughter's sons, *who were living as members of a joint family*, is *ancestral* property which devolved on them jointly with rights of survivorship (*Venkayamma v. Venkatramanayyamm*, 25 Mad. 678). The Madras High Court understood this decision as laying down a general principle that property inherited from a maternal grandfather was not only joint property subject to the right of survivorship, but *ancestral property* in the technical sense, *i.e.*, property in which the male issue acquire an interest by birth (27 Mad. 382). But the Allahabad High Court explained the Privy Council case in a different light. It says that the only question before their Lordships was whether, when property devolved by inheritance from maternal grandfather on persons, who were members of a joint family, the rule of survivorship applied, and the question as to what constituted ancestral property was not at all discussed. According to the Allahabad High Court, therefore, such property is not ancestral in the technical sense, but joint property subject to the rule of survivorship (*Jamna Prasad v. Ram Prasad*, 29 All. 667). The Patna High Court is also of the same opinion as the Allahabad (3 Pat. L. J. 168). In a recent case (*Muhammad Husain v. Kishna Nandan*), the Privy Council has approved the view taken by the Allahabad and Patna High Courts. Referring to their earlier ruling,

+ Comment on the following : "Property inherited by a grandson from a maternal grandfather is ancestral in his hands." (April, 1930.)

their Lordships state : "...the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship. On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died. Thereupon the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was, whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which that term is used by the Hindu law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived." In this later case, their Lordships clearly lay down that the term "ancestral estate" in its technical sense under Hindu law must be confined to the property descending to the father from his male ancestor in the male line, and that the estate of the grandfather in the hands of the daughter's son is not ancestral in this technical sense.

The Bombay High Court has held that when the property of the maternal grandfather goes first to his daughter who is living at the time, and on her death to her son, the property is not *ancestral* in the technical sense and the son can devise it by will. The reason is that, in the Bombay Presidency, a daughter takes absolutely the property inherited by her from her father, so that on her death the property will devolve on her son as her stridhana heir and not as a reversionary heir of her father (*Manibhai v. Shankarlal*, 32 Bom. L. R. 138).

§ 62. Separate property. It is competent to a member of a joint family to acquire property for himself independently of his coparceners. Such separate acquisitions can be dealt with at the pleasure of the acquirer. In default of a will, they pass to the *heir* of the acquirer by *succession*.

* Property acquired in the following ways is the separate property of the acquirer :—

(1) Property inherited from a collateral, such as a brother, nephew, cousin or uncle.

(2) Gift of a *small* portion of *ancestral* property made by the father through affection.

* In what different ways can a Hindu acquire separate property ? (April, 1933.)

(3) Father making a gift of, or bequeathing by a will, his self-acquisitions to one of his sons in the absence of an expression of a contrary intention, according to the Bombay and Allahabad High Courts. In Calcutta, such property would be ancestral, the same is the case in Madras, in the absence of an expression of an intention that it should be taken as self-acquired.

In a recent case, the Privy Council observed that *prima facie* a gift to a member of a joint Hindu family is his separate property and will only become joint family property when it descends to his sons, unless the donee himself has made it joint family property by throwing it into the common stock (*Bahu Rani v. Rajendra Bakhsha Singh*, 35 Bom. L. R. 490, P. C.). Therefore, in the absence of evidence of the intention of the donor that the donees should take the gifted property as joint family property, the donees will take separate shares as tenants-in-common (*vide* § 152, *infra*).

(4) Marriage gifts received by a member.

(5) Property, once ancestral, but alienated by the family and repurchased by a member out of his self-acquired property. Where certain property allotted to one branch of the family was subsequently repurchased by a member of another branch with his own money and there was no intention on the part of the acquirer to merge the repurchased property in the joint property, it was held that the repurchased property became the self-acquisition of the acquirer and was not liable to partition with the other members.

(6) Ancestral property *lost* to the family and recovered by a coparcener *without the aid* of the family members or of family funds. The property must have passed into the *possession of strangers* and held by them *adversely* to the family. Where the father recovers such property, he takes it exclusively for himself, whether it is movable or immovable. But if it is recovered by any other coparcener, he takes it exclusively only if it is *movable*; in the case of *immovables*, the recoverer takes $\frac{1}{4}$ th part as a reward, the remainder being shared by all the members including the recoverer. Where a Hindu father obtains title to joint family property by excluding his coparceners, such property does not

become self-acquired in his hands, but remains joint family property in which his sons have shares by birth (40 Bom. L. R. 127).

(7) Government grant, except where it appears from the grant that it is to enure for the benefit of the family.

Even when upon the terms of the grant, it appears that the grant was for the personal benefit of the individual grantee, it is open to the grantee to treat it as joint family property, and it is equally open to the members of the family to prove that the consideration paid to Government for the grant originally proceeded from the family funds. In either of these cases, though initially the grant was the separate property of the grantee, the property would acquire the character of joint family property (40 Bom. L. R. 118).

(8) Impartible property and its savings.

(9) All property held by a sole surviving coparcener. On the death of all other coparceners, the surviving member can treat the whole joint family property as if it is his separate property. The same is the case with a share obtained on partition by a person having no male issue.

(10) Income of separate property.

(11) Separate earnings of a member by his own exertions or with his separate capital, *and* without detriment to the family estate.

Separate property assumes that the holder of it has ceased to be in union with those in reference to whom the property is separate. But a man may be separated from one set of persons, e.g., his brothers, while he may be in union with others, e.g., his own issue. As regards his brothers, his property may be separate, while as regards his own issue, it may be joint. *Self-acquisition*, on the other hand, may be made by any one in a state of union, and when made, will be effective against the whole world. Ordinarily, the terms separate property and self-acquired property are used without any distinction.

§ 63. Self-acquisition and gains of learning. "The income of a member of a joint family obtained (1) by his own exertions *and* (2) without "any detriment to the father's estate," *i.e.*, without the aid of the joint family funds, is his self-acquired property, provided he has not blended it with the joint

¹ What property can a member of a joint Hindu family claim as his self-acquisition? Under what circumstances are the gains of science not partible among the coparceners of the acquirer? (April, 1926.)

property, with the intention of abandoning all separate claims over it.

Gains of Learning Act. An important species of self-acquisition is the gains of learning. “‘Learning’ means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.” “‘Gains of learning’ means all acquisitions of property made substantially by means of learning.....whether such acquisitions be the ordinary or the extraordinary result of such learning” (Sec. 2, Gains of Learning Act, 1930, *vide* Appendix). If a property has been acquired by way of such gains of learning, it shall be held to be the exclusive and separate property of the acquirer, notwithstanding (a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of any member thereof; or (b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof (Sec. 3).

This is the law as laid down by the Hindu Gains of Learning Act, 1930. The Act removes the anomalies in the old law and makes the law uniform as regards self-acquisitions of every kind. The test now is *whether in the particular acquisition in question the acquirer has received any help from the joint family funds*. Merely receiving maintenance or education, which becomes useful for the purpose of acquisition, does not count as help, such as would render the acquisition a joint family property.

Under the old law, gains of learning or science meant the acquisitions of a coparcener by the practice of a profession or occupation requiring *special* training. * Under the old law of the Smritis, acquisitions made by means of learning were the exclusive property of the acquirer. But partly in the hands of the commentators and partly in

* Trace the growth of the law as to “gains of science.” Discuss the principle on which it is based and point out the anomalies, if any, in that law. (April, 1929.)

Write short note on “Gains of Learning.” (April, 1942.) What are the effect of the Gains of Learning Act on the old rule established by the decided cases? (Oct., 1940.)

the hands of the Courts, the rules about gains of science underwent a change. At first, it was held that the gains of *an ordinary general education* were partible, if the education was imparted at the family expense, or was received by a person in the enjoyment of a family maintenance. Latterly, under the law as it stood before the passing of the Gains of Learning Act, such gains were partible, only if *the acquirer received a specialised education at the family expense*. "We think we shall be doing no violence to the Hindu texts, but shall be only adapting them to the condition of modern Hindu society, if we hold that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gain, and not the elementary education which is the stepping stone to the acquisition of all science" (*Lakshman v. Jamnabai*, 6 Bom. 225). Thus, it was held that the income from the post in the Indian Civil Service fell within the term *gains of science* (*Gokul Chand v. Hukum Chand*, 48 I. A. 162). "It is now clear that personal earning and acquisitions may remain partible throughout the unseparated member's lifetime, if he was originally equipped for the calling or career, in which the gains were made, by a special training at the expense of the patrimony." But this was not the case where the acquisitions were due to native talent or to education received from strangers, and *what the acquirer had received from the family was slight or ordinary education*, suitable to his position as a member of the family. Thus the salary of a Subordinate Judge, who had received slight elementary education of an entirely non-professional character, and so far as his knowledge of law was concerned, was a self-taught man, was held impartible (*Lakshman's case*). So also, gains made by a person, who had received ordinary education, as a clerk, a broker and then as a money-lender, personally and without the aid of the joint funds, were held to be his self-acquired property (*Metharam v. Rewachand*, 45 I. A. 41). But as in the case of other acquisitions, the presumption was that gains of science were joint and partible, and the burden of proving the contrary was upon the person who alleged it.

Thus the law regarding the gains of learning, as it stood before the passing of the Gains of Learning Act, was full of difficulties and anomalies. (1) It was difficult to decide what was special or scientific and what was ordinary or general education, and what was the ordinary or extraordinary income of such education. (2) It was anomalous to distinguish the gains of labour or bargain of a coparcener from his gains of learning, and to treat the former as his separate property and in the case of the latter to raise a presumption that they were joint and partible. In both the cases, the acquirer is indebted to the family funds; in the case of gains of labour or bargains for his nurture, in the case of gains of learning for his nurture as well as the professional education which has made him skilled in his profession. (3) If the

special education is to be deemed the stock from which success and income accrue, this should be held applicable to success and income to the end of the learner's life, so that whether he remains joint or separate, his gains of learning should be held joint and partible; however, such a member could come to a partition without being under any future liability as to what he may make after the partition.

§ 64. **Presumptions as to coparcenary.** The following are the leading presumptions which govern the burden of proof in suits which involve a question as to whether a family is joint or separate, or whether a particular property belongs to the joint family or is the separate acquisition of a member.

(1) Every Hindu family is presumed to be joint in food, worship and estate (12 M. I. A. 523). The burden of proof, therefore, lies upon the person who alleges separation. The members may dwell and mess apart, and yet remain joint in estate. Hence, cesser in commensality (*i.e.*, ceasing to dwell and mess together) is not conclusive proof of separation, though it is an element which may be taken into consideration along with other facts (*Ganesh v. Jewach*, 31 Cal. 262, P. C.). The strength of the presumption of union necessarily varies in each case, being stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family, it becomes weaker and weaker (*Yellapa v. Tippanna*, 31 Bom. L. R. 249).

(2) A family once proved or admitted to be joint is, in absence of proof of separation, presumed to have continued joint.

(3) Where it is proved or admitted that a partition has taken place, the burden of proving that a *particular portion* of the family property is still joint is upon the person who alleges it (25 Bom. 267; 39 Bom. L. R. 1102; 55 Mad. 483).

(4) Where it is proved that a family is joint and possesses joint property, the presumption is that all the property in the hands of its members is joint. But from the mere fact that a family is joint, there is no presumption that it possesses joint property or any property (31 Bom. L. R. 280; 35 Bom. L. R. 308, P. C.; 43 Bom. L. R. 465, P. C.). Possession of joint property is not a condition precedent to the establishment of the status of members of a joint family (29 Mad. 98). A *nucleus of joint property*, that is, the fact that the family had some joint

property before, must be established, before it may be presumed that property in the hands of any member is joint property (*Daji v. Laxman*, 29 Bom. L. R. 122). The nucleus of the joint family property to give rise to that presumption must be family property from which the purchase money for the property in question might have been derived wholly, or, at any rate, in considerable part (39 Bom. L. R. 846). Where the nucleus is established, the burden of proving that a particular property is the self-acquired property of a member is upon him. The mere fact, that it was purchased in his name and that there are separate receipts in his name respecting it, does not render the property his separate property. But if, besides the fact that certain property stands in the name of one of the members, there be these further facts, that he was allowed by the family to appear to the world to be the sole owner, and that some other members had acquired separate properties with their own money and dealt with them as their own, the presumption that the property is joint is weakened, and the burden of proving that it is joint will lie on those who allege that it is joint (6 I. A. 233). Where no nucleus of joint property is admitted or proved, the onus is upon the party asserting that property was not the self acquired property of an individual member, or that he threw it into the common stock, to prove it (60 Cal. 1253).

§ 65. Ancestral business. * In Hindu law, a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. In the hands of his sons, it becomes a species of ancestral property in which their issue acquire an interest by birth.

Where a family carries on a trade which is handed down from its ancestors, it becomes a *trading family* (*Raghunathji v. The Bank of Bombay*, 34 Bom. 72). But as such a family partnership arises *not from contract*, but by operation of law, the ordinary rules of partnership do not apply *in toto*, but would be

* Explain an ancestral business with its incidents. How will you distinguish it from an ordinary partnership under the Contract Act? Can there be a joint family business under Mahomedan law? (April, 1931.)

Write short note on "Ancestral business." (Oct., 1940.)

modified by the general rules of Hindu law, which regulate the transactions of joint families. Thus, (1) a partnership is dissolved by the death of a partner, but a joint family firm is not dissolved by the death of a coparcener (A. I. R. 1939 Cal. 92). (2) In the case of a partnership there is no right of survivorship, whereas in a joint family firm there is the right of survivorship. (3) In an ordinary partnership, one of the partners, when severing his connection with the business, can ask for an account of the past profits and losses, but in a joint family trade such a thing is not possible, and a suit for partition is the only remedy. (4) In the case of partnership, each partner stands to the other in the relationship of an agent and principal, and can bind his partners by debts incurred in the ordinary course of partnership business. But in the case of a joint family, only the manager has an implied authority to contract debts, and pledge the credit and property of the family for the ordinary purposes of family business, and no other coparcener has such an authority. (5) In the case of a partnership, not only the share of each partner, but their separate property also would be liable for the payment of partnership debts. In the case of debts contracted by a manager for the joint family trade, only the manager is personally liable, *i.e.*, his separate property besides his share in the joint family property is liable. But as regards other coparceners, whether major or minor, they are liable only to the extent of their interest in the family property, unless in the case of *adult* coparceners, the contract sued upon, though purporting to have been made by the manager alone, is, in reality, one to which (a) they are actual contracting parties, or (b) they can be treated as contracting parties by reason of their conduct, or (c) they have subsequently ratified it. In the case of *minor* coparceners, their separate property would be liable *only if they have ratified it on attaining majority* (*vide*, however, 14 Rang. 122).

In order that the special incidents of a joint Hindu family firm might apply the business must be of an undivided joint Hindu family. Where six adult Hindus, not belonging to the same family, but to four different families entered into a business partnership, it was held that the partnership was governed by the Indian Partnership Act and not by the rules of Hindu law (1936, 14 Rang. 313).

* The manager of a joint family cannot start a *new* business so as to bind the share of the other adult coparceners, unless the business is started or carried on with their New business. express or implied consent (45 Mad. 281).

The manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by himself and the other adult members (*Sanyasi Charan Mandal v. Krishnadha Banerji*, 49 I. A. 108). It does not make any difference that the manager starting the new business is the father. A business started by the father as manager cannot, if new, be regarded as ancestral so as to render the minor member's interest in the joint family property liable for debts contracted in the course of the business (*The Banares Bank, Ltd. v. Hari Narayan*, 34 Bom. L. R. 1079, P. C. ; 45 Bom. L. R. 259). "The distinction between an ancestral business and one started like the present one after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and obligations. In the other they rest ultimately on contractual arrangement between the parties" (49 I. A. 108).

The decision of the P. C. in *The Benares Bank, Ltd. v. Hari Narayan* given above, is interpreted by the Allahabad Court to mean that money borrowed for the purposes of a new family business, started by the father, is not in itself a valid justification for alienation of family property, as it is in the case of an ancestral family business, but that it does not lay down that in no case it can be a valid justification. The question whether a particular transaction, even though the money was required for the purposes of a newly started business, was for legal necessity or for the benefit of the estate and family is a separate question. If the business, though not ancestral, had become joint family business and was not the separate business of particular members, then there may be circumstances under which money, required for such business may be for legal necessity or for the benefit of the family and the family estate. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of each case and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered in the interests of the family (*Ram Nath*, 57 All. 605,

* A manager of a joint Hindu family starts a new business in collaboration with the adult members of the family. Are the minor members liable for losses suffered in such business? (April, 1932).

F. B.). It was held also in an earlier Full Bench case, that where the transaction was not speculative but was in the best interests of the family for benefit, which an ordinary prudent manager would have made, it would be open to the Court to hold that the transaction is binding on the other members of the family though the loan was secured by an alienation of the joint family property (*Amrej Singh*, 55 All. 1).

Special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by Hindu law. There is no presumption that a business conducted by a member of a joint family is a joint family business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. Jointness in a family can be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members. Where positive *prima facie* proof of jointness has been given, consideration of the usurpation of power by a senior and managing member or of the practice of opening family business in the names of one or more members of the family, may render harmless entries which otherwise appear to disprove jointness. But they do not provide a formula whereby jointness can be proved. No presumption can readily be made that the conduct of a managing member is contrary to his duty towards a junior member or that the acquiescence of the junior member would be readily obtained (*Bhuru Mal v. Jagannath*, 44 Bom. L. R. 767 P. C.). Where coparcenary funds are employed in a business, it will be presumed to belong to the joint family in the absence of evidence to the contrary (A. I. R. 1937 Mad. 335). There is no presumption that a new business carried on by a member of a joint Hindu family in partnership with a stranger is joint family business. It may be or it may not be. It is a matter for evidence in each particular case. A member of a joint Hindu family, which carried on an ancestral banking business, started a new business in timber in partnership with a stranger. The business was financed from family funds, the transactions of the business were entered in the books of the family firm, and blended with their accounts. It was held, that as, in the circumstances of the case, the member treated the business as one in which the family was interested and as he did not regard his interest in the business as his separate property, his interest was the property of the joint family (*Raghbir v. Ram Ratan*, 1914, 46 Bom. L. R. 185, P. C.).

Partnership with strangers. The mere fact that a coparcener is carrying on business does not raise the presumption that all the other coparceners are his partners in that business, entitled to rights and responsible for its liabilities with him (27 Bom. 157). The fact of

partnership must be proved as in other cases. Where a business is carried on by some individual members with strangers, the relation of partners is governed by contract and not by Hindu law. Where the managing member of a joint Hindu family enters into a partnership *with a stranger*, the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into the contractual relationship with the stranger. The partnership so constituted will be governed by the Indian Partnership Act, 1932 (36 Bom. L. R. 976). In such a case, therefore, the death of one of the partners will surely dissolve the partnership. The same is the case when the manager of a joint family enters into a partnership, and contributes the capital from the joint family funds. The contractual relations established are between the third party and the manager, and not the third party and the family (45 Bom L. R. 175). In such a case, as between himself and the other members of the family, he is to be deemed to be the representative of the family in the firm, and is accountable to the family for his share of the profits and business assets. But such a partnership is exclusively one between him and the stranger, and on his death, the surviving members cannot claim to continue as partners nor can they institute a suit for a dissolution of the partnership (28 Mad. 344, 41 Mad. 454). Similarly, the stranger partner cannot sue the surviving members as partners for the member's share of loss, his only remedy being to proceed against the manager's estate, if any (43 All. 116).

But where the manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business, the members of the family, minor or otherwise, become liable to the extent of their interests in the family property for the debts binding on the manager in the partnership business (A. I. R. 1938 Mad. 849).

§ 66. Rights of coparceners. (1) *Community of interest and unity of possession.* "There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had, during the deceased's life-time, a common interest and a common possession" (*Katama Natchiar v. Rajah of Shivagunga*, 9 M. I. A. 543).

(2) *Joint possession and enjoyment.* As coparceners, the rights of all members are equal and the family property is to be utilised for all necessary purposes of each member. Every coparcener can claim to be placed in joint possession and enjoyment with the other coparceners, and he can enforce his right to such

possession and enjoyment by a suit. He is not bound to sue for partition. To hold otherwise would be to compel a coparcener, at the instance of other coparceners and against his will, to break up the family by bringing a suit for partition (*Naranbhai v. Ranchhod*, 26 Bom. 141). But in a suit for possession, the excluded member can only claim to be placed in joint possession of the family property and not in separate possession of a particular property. For this latter purpose, his only remedy is a suit for partition.

(3) *Right to enforce partition.* Every adult coparcener has the right to obtain partition of the family. The Bombay High Court recognises one important exception to this rule, that where the father is joint with his father or other collateral members, the son cannot enforce a partition against the father's will (*Appaji v. Ramachandra*, 16 Bom. 26, F. B.). In the Punjab also, the son's right to demand partition during his father's lifetime is denied. Other High Courts do not recognise this exception, as the right to demand partition is the very essence of a coparcenary. "It is the right to demand partition which determines the right to take by survivorship." But a member cannot sue for a declaration as to the amount of his share, nor can he sue for a share of the property or its profits, since he has no definite share until partition.

(4) *Right of survivorship.* In the case of the death of a co-parcener, his interest survives to the other members, except in cases mentioned in § 59.

(5) *Right of maintenance and necessary expenses.* Every coparcener is entitled to receive from coparcenary property maintenance for himself, his wife and children, as well as for those whom he is legally or morally bound to maintain. Before partition, the right of a brother or nephew of the karta may be called and often is called a right to be maintained, but it is the same right as the karta has himself. Unity of possession is the basis of their right, which is a right to live upon the fruits of their property. The karta has no special interest therein; there is community of interest and each coparcener is in joint possession of the whole. The right of the son or nephew in the income is not a right to an exact fraction of the income; the karta may well spend more on a son whose family is large or who has special aptitudes or

necessities. But, however wide his discretion within the extensive range of family purposes, he has no right to apply any part of the income to other purposes; and is liable in appropriate proceedings to make good to the other members their shares of such sums which he has actually misappropriated. The various powers of management as karta, though given even to the father, confer on him no larger interest in the income or the corpus, and no larger rights of enjoyment on his own behalf (*Commissioner of Income-tax, Punjab v. Krishna Kishore*, 44 Bom. L. R. 196, F. C.). Besides maintenance, a coparcener is also entitled to get sums of money from coparcenary property for the performance of the annual Sraddhs, the ceremony of Upanayana and the marriage of his children.

(6) *Right of alienation.* According to the Madras, Bombay and C. P. Courts, a member of an undivided family can alienate his share for value, as by way of sale or mortgage, but according to the Bengal, Allahabad, Punjab and Oudh Courts, he cannot alienate it at all (*vide* § 71, *infra*).

(7) *Right to impeach unauthorised alienations.* Every coparcener possesses the right of impeaching alienations of the manager or other coparceners in excess of their power. He can also restrain an improper act on the part of the other members, where such an act occasions a substantial injury to his rights or is a direct infringement of his clear and distinct rights as a member of the family. Thus where a coparcener erects a building on land belonging to the family so as to alter *materially* the condition of the property, or does any other act which would interfere with the joint enjoyment, he may be restrained by an injunction. But the remedy by way of injunction is a discretionary remedy, and the Courts generally exercise their jurisdiction only in cases of waste, illegitimate user of the family property, or acts amounting to ouster.

(8) *Right to renounce.* A coparcener can renounce his interest in the coparcenary property. A renunciation of his interest in the family property can be effected by a coparcener by an expression of his intention to that effect, and no formality is necessary (45 Bom. L. R. 773). Such a renunciation, according to the Allahabad and Lahore High Courts, must be in favour of the whole body of the coparceners. If a coparcener renounces in

favour of one or more individual members, the renunciation enures for the benefit of all the coparceners (16 All. 369 ; A. I. R. 1938 Lah. 478). But according to the Madras High Court, a renunciation can be in favour of one or more individual members, or of the whole body of coparceners (11 Mad. 406). If a coparcener, having sons, renounces his interest, his sons would be entitled to his interest (33 Bom. 267). The renunciation must be of the interest in the whole and not in part of the joint family property (A. I. R. 1938 Lah. 478).

According to the Bombay High Court, where a coparcenary consists of two members only, it is open to one of them with mutual concurrence to gift his share in the undivided property to the other coparcener. But a mere renunciation without more would not amount to a partition, and it would not change the nature of the property so gifted or renounced in favour of the donee. Such property remains the coparcenary property and does not become the donee's separate property (45 Bom. L. R. 773). As held by the Privy Council, a coparcener's renunciation merely extinguishes his interest in the estate, but does not affect the status of the remaining members *quoad* the family property, and they continue to be coparceners as before. The only effect of renunciation is to reduce the number of persons to whom shares would be allotted if and when a division of the estate takes place (*Alluri v. Dantuluri*, 63 I. A. 397).

Right to account. The rule is that a coparcener has no right to demand accounts from the manager for his dealings with the coparcenary property and the income thereof, without bringing a suit for partition (10 Bom. 528). It is only when a coparcener brings a suit for partition that a manager would be liable to account, but even then only for the family property as it exists at that time (*vide* § 68). But according to the Mitakshara law as interpreted in Bengal, a coparcener can demand an account of the family affairs without actually suing for a partition (*Abhayachandra v. Pyari Mohun*, 5 Beng. L. R. 347).

Adverse possession against a coparcener. The possession of coparcenary property by one coparcener enures for the benefit of all the coparceners, and the separate possession of one coparcener is not adverse to another, unless his possession was in assertion of hostile title, or where his possession is from its nature inconsistent with joint possession of all. Hence, where it is admitted or proved that the plaintiff was a member of a joint family, the burden of proving his exclusion, and his knowledge of such exclusion for the necessary period of 12

years, which would bar his right, lies upon the person asserting such exclusion (46 Bom. 216 ; 4 Luck. 503).

Family arrangement. The arrangement to be a valid arrangement must be one concluded with the object of settling *bona fide* disputes arising out of conflicting claims to property. A *bona fide* dispute, existing or prospective, is necessary. *Bona fide* is the essence of the transaction, and from this it follows that there must be either a dispute or at least an apprehension of a dispute which is avoided by a policy of giving and taking (A. I. R. 1938 Cal. 490). In order to have a valid family arrangement, it is not necessary that there must be disputes in existence at the time when such arrangement is arrived at. It may be that the members of the family anticipate disputes likely to arise hereafter. If in order to prevent the arising of such disputes and to secure peace and happiness in the family, they arrive at a settlement amongst themselves, the settlement arrived at would be valid (52 All. 716 ; A. I. R. 1939 Oudh 189 and 433). Family settlement, as an agreement, is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which parties defined their respective interests for the sake of avoiding future trouble (61 I. C. 940). Such a compromise is not affected by section 6(a) of the Transfer of Property Act as a transfer of a mere *spes successionis*. It cannot be impeached between the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right. It is a compromise for valuable consideration, and cannot be repudiated unless it is shown to be illegal or void (41 All. 611 ; 31 Mad. 474).

Nature of coparcenary interest. * Every member of a coparcenary acquires an interest in the family property by birth, but such an interest is not defined, until a partition is effected or the members agree among themselves that a particular property shall be held in defined shares. The essence of coparcenary being the unity of ownership, the coparcenary property belongs to the whole body of coparceners. "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a definite share" (*Appovier v. Rama Subba*, 11 M. I. A. 75). His interest is a fluctuating interest, capable of being enlarged by deaths or liable to be diminished by births in the family. A coparcener has no specific property in the coparcenary property, but only an interest which may ripen into specific property on partition.

The above is the statement of the strict rule of Hindu law,

* What are the essential characteristics of an undivided coparcenary interest? (April, 1933.)

under which the only substantial right of a coparcener was to demand a partition and to have his indefinite interest made definite thereby. But various inroads have been made by case-law in this position on grounds of equities in favour of strangers. Thus, (1) in Bombay and Madras, it has been recognised that a coparcener can alienate for value his undivided coparcenary interest, and it is well-established that the alienee's right is to the fractional share to which his alienor was entitled at the date of the *alienation*, if he had then claimed and carried through a partition. It follows that his alienor had at that time something to sell which was not merely a right to claim partition but some real and definite interest in the property which could be the subject of a legal transfer of property. (2) Then, on the insolvency of a coparcener for his personal debts, his share vests in the Official Assignee (or Receiver) and is thus lost to the joint family (*vide* § 73, *infra*). That share can vest in the Official Assignee (or Receiver) only if it first vested in the insolvent coparcener; and the vesting of a share is a very different thing from a mere claim to partition. The result is, that in the law as it stands at present, the undivided coparcenary interest of a coparcener is made definite by an act which is not the act of partition. (3) Again in all the Mitakshara sub-schools, the share of a coparcener can be attached for a personal decree debt, and when once attached it will be held by the Court to satisfy the debt, even if the coparcener dies before the Court sale. It is difficult to realise how a mere claim to partition is attachable. Clearly, here also the theory is that some tangible interest vests in the coparcener, which can be the subject of the attachment and Court sale. (4) Lastly, the law laid down by the Madras High Court, that at the time of a second partition, the shares at the time of the first partition should be taken into account (53 Mad. 1) involves the proposition that the branches of the joint family take a vested interest (*vide* § 81, *infra*). Thus the above theory of the joint family status has been considerably modified in practice and is no longer good law.

So that as the law stands, it involves a proposition that a coparcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate in extent from time to time, but definite and ascertainable at

any particular point of time, and actually made definite and ascertained by the act of the coparcener seizing and using it for his benefit, and holding it as against the possession and use of it to which the joint family as a whole is entitled. The act of alienation makes definite the indefinite interest which the coparcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu law about the devolution on death. The net result of the law as it stands seems to be this, that each member of the joint family has at any definite period of time a present vested interest in the fractional share which would be his, if a partition were there and then made, and which would, by a partition at his will and pleasure, be converted into a separate interest (*per* Wallace, J., in *Narayan v. Sankar*, 53 Mad. I, F. B.).

A son acquires on birth an interest equal to that of the father in ancestral property. He does not acquire his title through his father, but separately and independently of him. The only respect in which the father has a superior right is that he has a power of disposition, for causes recognised as just and proper under Hindu law, over the joint family property including the son's interest therein.

§ 67. Management. The joint Hindu family is governed on the principle of subordination and its affairs are managed by one person, called the manager or *Karta*, whose acts within the scope of his authority are binding on the family. A Hindu family may be regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown (7 Bom. 467).

The father is the manager of the family consisting of himself and his descendants and other relations. After the death of the father the eldest son generally becomes the manager of the family, though it is possible that a more capable son may become the manager. Thus, the property belonging to a joint Hindu family is ordinarily managed by the father or other senior member for the time being of the family. The senior member may give up his right of management, which would then devolve on a junior member. A junior member may also act as the manager, when

the senior member is incapacitated by failing health (A. I. R. 1938 All. 147).

§ 68. Position of a manager. *The position of a manager in a joint Hindu family is not analogous to anything known to English law. Neither the term "partner", nor "principal", nor "agent", will strictly apply (A. I. R. 1932 All. 632). In dealing with the same question, the Privy Council said, "The relation of such persons is not that of principal or agent or of partners: it is much more like that of *trustee* and *cestui que trust*" (*Chetty v. Chetty*, 30 I. A. 220). But he is not a trustee in the sense that he is liable to account for his past dealings with the family property nor is he under the same obligation to economise or save as would be the case with a paid agent or trustee. Under the Dayabhaga law, his position approximates more closely to that of a trustee than under the Mitakshara law, as under that law, he is liable to account for his past dealings with the family property.

Speaking generally, the manager represents the joint family in all its affairs and transactions or concerns, provided they are for family necessity (*Umakant v. Marland*, 35 Bom. L. R. 388). The authority for his action is not always to be derived from the consent of the other members of the family, some of whom may be minors, and therefore incapable of giving a valid consent (A. I. R. 1932 All. 632). He is a sort of a *representative owner*, his independent rights being limited on all sides by the correlative rights of others, and burdened with a liability, co-extensive with his ownership, to provide for the maintenance of the family (Mr. Cowell, Tagore Law Lectures).

Manager's Powers. (1) *Power over income.* The manager has control over the income and expenditure, and he is the custodian of the surplus, if any. So long as he spends the income for the purposes of the family, he is not under the same obligation to economise or save as a paid agent or trustee would be. If he spends more than the other coparceners approve, their remedy is to demand a partition. On the other hand, he is liable to make good to them their shares of all sums which he has misappropriated, or which he has spent for purposes other than those in which the joint family is interested [*vide*, § 66(5)].

* Discuss the position of a manager in a joint and undivided Hindu family. (March, 1924.)

(2) *Power of alienation of coparcenary property.* * This power is limited, and the manager cannot make any alienation, unless he has obtained the consent of the other members of the joint family, if they could give it, or unless there was some established necessity to justify the transaction (*Shankar v. Daooji*, 33 Bom. L. R. 1000, P. C.). The manager has the power to alienate for value joint family property, so as to bind the interests of both adult and minor coparceners in the property, provided the alienation is made for a *legal necessity* or for the *benefit of the estate* (vide § 44). If legal necessity is established, the express consent of the adult coparceners is not necessary to validate the alienation (*Sahu Ram v. Bhup Singh*, 44 I. A. 126). In case there is no necessity or reasonable inquiry on the part of a purchaser, only the share of the manager and of members who have consented will be bound by the alienation. In the case of minors, as they cannot give consent to any alienation, their interests would be bound by an alienation only if it is for a justifying necessity (*Shankar's case*). As regards powers of alienation over the family property for purposes of family necessity or benefit the manager under the Dayabhaga law has the same position as under the Mitakshara law (A. I. R. 1942 Cal. 533).

(3) *Powers of alienation for family business.* An alienation for purposes of the family business is an alienation for a legal necessity or for the benefit of the family. The power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for the ordinary purposes of that business (*Shri Thakur Ram v. Ratan Chand*, 53 All. 190, P. C.).

(4) *Power to contract debts for family purposes and family business.* Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an *implied* authority to contract debts for its purposes, and the creditor is not bound to inquire into the pur-

* What are the powers of a manager of a joint Hindu family and the Hindu father as such to alienate joint family property? (Oct., 1932.)

Describe the powers of a manager of a joint Hindu family in respect of alienating family property. Will it make any difference if the manager happens to be the father? (April, 1944.)

Enumerate the circumstances and state the conditions under which a manager of a joint Hindu family can alienate joint family property (April, 1932.)

pose of the debt in order to bind the whole family thereby, because that power is necessary for the existence of the family (34 Bom. 72 ; 15 Lah. 9). A mortgage for the purpose of discharging debts incurred in carrying on the family business is binding upon the joint family *including the minor members* (1931, 53 All. 190, P. C.). A manager of a family has authority to raise money not only to discharge debts arising out of the family business, but to obtain money needed to carry it on (8 Lah. 597, P. C.). It is for him to decide whether the money should be raised by mortgage or sale, and whether it is better to raise money to continue the business or to close it down. It is not for the lender or purchaser to go into questions of that kind (*ibid*).

(5) *General powers* of the manager of joint family business of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business (*Kishen Prasad v. Har Narain*, 38 I. A. 45).

(6) *Power of reference to arbitration*, or to compromise *bona fide* for the benefit of family, or to give a valid discharge of debts due to the family (16 All. 231 ; 45 Bom. 446 ; I. L. R. 1940 Lah. 599).

Where a compromise has been entered into in good faith by the manager of a joint Hindu family, or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit unless there is fraud or some other ground which in law vitiates it (40 Bom. L. R. 1065, P. C.).

(7) *Power to acknowledge debts*. An acknowledgment, or payment of interest, or part payment of the principal, by the manager or his duly authorised agent will extend the period of limitation, and shall be deemed to have been made on behalf of the whole family (*vide*, Sec. 21 of the Limitation Act). But a manager has no power to relinquish a debt due to the joint family nor can he pass a promissory note to revive a time-barred debt so as to bind the whole family.

(8) *Power to represent in suits* upon transactions entered into by him *in his own name* on behalf of the family. A decree passed against him, *as representing the family*, is binding upon all the members including the minor members. Such a decree operates as *res judicata* against all the members (*Kishen Prasad's case* ; *Sheo Shankar Ram*, 41 I. A. 219).

(9) Power of guardianship over the undivided interest of minor members.

In the case, therefore, of a joint Hindu family it is only the manager who can bind the family in things, such as discharge of a debt. A discharge given by any other member of the family, for example, a younger brother of the manager, would not be a valid discharge binding on the family (*Umakant v. Martand*, 35 Bom. L. R. 388).

Where the question involves a transaction relating to a joint family business, the following principles apply : (1) If the business is merely the individual enterprise of any particular member or members of the family, as distinct from a "family" business, no question either of "need" or "benefit" of the family can arise and the transaction can never bind the interests of the other members of the family. (2) Where the business is strictly "ancestral", then either "need" or "benefit" to the estate or family will be presumed (57 All. 605). (3) Where the business is a "family" business, but is new business, no such presumption arises, and the question whether there has been benefit to the estate or family becomes one of fact. In that case, where no actual benefit is positively proved, the mortgagee has to show that he made reasonable inquiries as to the purpose for which the loan was required and was reasonably satisfied that the purpose was beneficial. (4) Finally, when it is shown that the business in question is the mainstay of the family, in the sense that it is all, or practically all, the family has to depend upon, then the mortgagee is entitled to accept that fact as a *prima facie* evidence that a loan taken for the purposes of that business is a transaction for the benefit of the estate or family. He is not required to go further and enquire into the technical business necessity for raising the money (A. I. R. 1941 All. 31). Family business, as distinguished from an ancestral business, may be started at any time, even after the death of the father (A. I. R. 1938 Lah. 563).

Legal necessity. The following have been held to be legal necessities, justifying alienations of family property by the manager :

- (a) payment of Government revenue ;
- (b) payment of debts of the family ;
- (c) payment of debts incurred for family business ;
- (d) maintenance of coparceners and the members of their family ;
- (e) marriage expenses of male coparceners, and of the daughters of coparceners ;
- (f) performance of necessary funeral or religious ceremonies ;

(g) costs of litigation necessary for preserving or recovering the estate, as also costs of defending the head of the family, or any other member, against a serious criminal charge.

Burden of proof of necessity. There is no presumption that a debt contracted by the manager of a Hindu family is contracted for benefit of the family (4 Lah. 200). Where the manager of a Hindu trading family borrows money on promissory notes executed in his own name and not in the name of the firm there is no presumption that the borrowing was for the purpose of the joint family business, and the lender must prove that the money was required for the family business (*Abdul v. Sarasvatibai*, 36 Bom. L. R. 225, P. C.). *If a purchaser or mortgagee seeks to make the joint family property liable, he is bound to inquire into the necessity for the sale or mortgage, and the burden lies on him to prove, either (1) that there was a legal necessity in fact, or (2) that he made proper and *bona fide* inquiry as to the existence of such necessity, and was in that inquiry led reasonably to suppose that the alleged necessity did exist (40 Bom. L. R. 742). A mere representation made by the manager to the effect that the money was required for the joint family business is not sufficient to discharge the onus which lies on the lender to show enquiry into the necessity for the loan (A. I. R. 1943 Lah. 33, F. B.). A mere recital of necessity in the document of alienation is neither necessary nor sufficient proof of necessity. There must be some evidence of necessity *aliunde*. But where a transaction is old, presumptions are permissible to fill in obliterated details (50 All. 823; *vide*, 1936, 38 Bom. L. R. 344, P. C.). In the case of an ancient transaction, it must be presumed that the transaction was lawful, *i.e.*, justified by legal necessity (thirty years' period suggested in A. I. R. 1941 Nag. 79). The burden of proof may then be placed on the reversioner of proving absence of legal necessity (*vide* 44 Cal. 186, P. C., for the evidentiary value of recitals of legal necessity in ancient documents). The lender must not merely show necessary purpose but necessity for the loan. Where the manager of the joint family to the knowledge of the lender had large resources and actual cash, the mortgage though created to

* What must the purchaser of the joint family property from the manager of a joint Hindu family prove to validate the sale to him? (Oct., 1932.)

pay land revenue was held not binding upon the estate (A. I. R. 1938 Nag. 476 ; A. I. R. 1941 All. 372). Where an alienee succeeds in proving necessity in fact, the previous mismanagement of the manager which brought about the necessity would not be material, unless it may be shown that he himself was a party to the mismanagement. A purchaser or a mortgagee is not bound to see that the money, paid or advanced by him, is actually applied to meet the necessity, the reason being that he can rarely have the means of controlling and directing the actual application, unless he enters on the management himself (*Hunooman Persaud v. Mussammat Babooee*, 6 M. I. A. 393). For this reason, (1) if the sale by the manager is itself justified by necessity, and (2) the purchaser acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that *part* of the price is not proved to have been *applied* to purposes of necessity, would not invalidate the sale. If the above conditions are fulfilled, the sale would be upheld *unconditionally*, whether the part not proved to have been applied to purposes of legal necessity is considerable or small (31 Bom. L. R. 803, P. C. ; 41 Bom. L. R. 779). It is *wrong* in such cases to draw a distinction, as was done by the Allahabad High Court, between the case where the part not proved to have been applied to purposes of necessity is *considerable* and the case where such part is *small*, and in the former case to pass a decree setting aside the sale conditionally upon the coparceners challenging the sale paying to the purchaser part proved to have been applied to purposes of necessity, and in the latter case to pass a decree upholding the sale conditionally upon the purchaser paying to the coparceners the price not proved to have been so applied. Thus, where the father sold one of the family properties for Rs. 3,500 out of which Rs. 3,000 were paid to the creditors of the family, but it was proved that the price was adequate, and the purchaser had made due inquiry as to necessity, it was *held* that the sale could not be set aside at the suit of the sons, merely on the ground that Rs. 500 were not applied to purposes of necessity (*Krishna Dass v. Nathu Ram*, 54 I. A. 79). The same principle has been applied to a sale by a widow having a widow's estate (*Suraj Bhan v. Sah Chain Sukh*, 105 I. C. 257). But this principle is not applicable in the case of a mortgage, where the father can borrow the precise amount required to meet the family necessity. If he borrows more money than is required,

the sons cannot be made liable for the sum in excess of the family necessity (4 Luck. 107 ; 14 Pat. 595). The mortgagee is entitled to a decree only for the amount justified by necessity (A. I. R. 1938 Pat. 383).

Where a creditor succeeds in proving necessity or proper and *bona fide* inquiry on his part, the alienation would be binding on all the members of the joint family, and the question of the consent by the other members to the alienation by the manager does not fall to be considered. But the remedy of the creditor is limited to the coparcenary property only and does not extend to the separate property of any member, unless such member is also the manager or is a party to the transaction, either expressly or constructively, out of which the liability arose (2 Lah. 159).

The contracting manager is liable to the extent of his share in the joint family property and also personally, that is to say, his separate property is also liable. The other coparceners are not liable personally, unless, in the case of *adult* coparceners, the contract sued upon, though purporting to have been entered into by the manager alone is in reality one to which they are actual contracting parties or one to which they can be treated as being contracting parties by reason of this conduct or one which they have subsequently ratified (A. I. R. 1937 Lah. 6, 247).

Minor members of a joint Hindu family, who acquire by birth a proprietary interest in the ancestral property, are incapable, by reason of their minority, from giving their consent to a person being treated as the ostensible owner of the ancestral property ; the fact that the manager and the adult members of the family so consented would not therefore estop the minor members from contending that the person making the transfer was not, within the meaning of section 41 of the Transfer of Property Act, the ostensible owner of the ancestral property (*Shankar v. Daooji*, 33 Bom. L. R. 1000, P. C.). But a contract for the sale of a joint ancestral property for legal necessity or benefit of the family, entered into by the manager of a joint Hindu family, of which some coparceners are minors, can be specifically enforced against the joint family including the minor coparceners. Such contracts stand on a different footing from contracts made by a guardian of a minor or a mere manager of his estate (57 All. 374).

Manager's liability. A manager is not liable under the Mitakshara law to account for his past dealings with the family property. He is liable to account *at the time of partition only*, and then only for the family property as it exists at the time. *He is liable for assets which he has actually received, not for what he ought or might have received, if the family property had been profitably dealt with ; but a member can show that an expenditure alleged by the manager to have been incurred was not in fact incurred, or that more properties are available for partition. A member would, however, be entitled to past accounts in the following cases : (1) where the person claiming the accounts has been excluded from the enjoyment of the property ; or (2) it is proved that the manager has misappropriated, or fraudulently converted, the family estate ; or (3) the management was grossly negligent and prejudicial to the interest of the claimant *during his minority* ; or (4) there was some previous agreement to enjoy the family property in specific shares and that arrangement has been disturbed ; or (5) there is a special agreement between the co-parceners and the manager for the latter's liability to account. But it has been held in Bengal that any coparcener may, *without bringing a suit for partition*, require the manager to account for his past dealings with the family property (*Abhayachandra v. Pyari Mohun*, 5 Beng. L. R. 347).

He is only bound to account for what he had in fact received and not for what he might or ought to have received if he had been more prudent or efficient or if the joint family funds in his charge had been more profitably employed. His power to spend money is only limited by family purposes. He is not under the obligation to save or economise. If he spends more on family purposes than what the other members approve their remedy is to have a partition. He can spend for family purposes more on one branch of the family than on another and his discretion is the final word. But he cannot misappropriate the family property or its income in a way to misapply them to purposes which are not family purposes. So long as he confines himself to these purposes he is not accountable for the past. He is only liable to account for the assets as they are or as they exist. But this does not mean that his statement or his account of the family assets are final and the members of the family are bound to accept his *ipse dixit*. They have right to have his statement and his account verified in the usual way. The position of the Karta both under the Mitakshara and Dayabhaga

* On what principles are accounts in a partition suit to be taken from the manager of a joint family? (March, 1922.)

is the same in this respect (A. I. R. 1938 Cal. 78). But though the position is thus similar, unlike the law of Mitakshara, in a Dayabhaga family a junior co-sharer has the right to demand accounts of the Karta while the properties are still joint and on refusal can enforce it by a suit without praying therein for partition (A. I. R. 1940 Cal. 51). Mesne profits cannot ordinarily be awarded in a partition suit ; but they can be awarded where it is shown that the plaintiff has been kept out of enjoyment of the coparcenary property (41 Bom. L. R. 562).

§ 69. Suits by and against members of family. The manager of a joint Hindu family can sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family properties (*Madhgouda v. Halappa*, 1934, 36 Bom. L. R. 327). A decree passed in such a suit would bind the family as a whole, unless it was established that the manager did not act in every way in the interest of the family (41 I. A. 216), or his conduct was tainted with fraud, or collusion, or was otherwise in bad faith (8 Lah. 693). What has to be determined is, to see whether the case falls under Explanation VI of S. 11 of the Code of Civil Procedure (dealing with the principle of *Res judicata*) ; the case falls under it where the manager is proved to be acting on behalf of the minor members in their interest, and if the members are majors, with their assent (*Lingangouda v. Basangouda*, 1927, 51 Bom. 450, P. C.). The consent of the major members need not be express ; it will be implied if they do not come and apply to be joined as parties to the suit (28 Bom. 11).

In such a representative suit by the manager, the interest of the defendant can, however, be safeguarded by bringing all the coparceners on the record of the suit (36 Bom. L. R. 327). But the fact that these other coparceners are added as co-plaintiffs after the expiry of the period of limitation would not affect the suit. The other coparceners are not necessary parties to the suit ; hence their joinder as co-plaintiffs after the statutory period has expired does not prevent the suit as originally constituted from being in time (33 All. 272, P. C.). The addition of even a minor coparcener after the expiry of the period of limitation is not fatal to the suit (33 Cal. 1079).

A member, who is not the manager, is not entitled to sue alone as representing the family (32 Bom. 375 ; 18 Mad. 33, as interpreted in 33 All. 272, P. C.).

Where a joint family carries on business, the members of the family, who are minors and who are not shown to have been admitted into the trading firm or to have taken any part in the business or exercised any control therein, need not be joined as plaintiffs in a suit to recover money due to the family trading firm (26 Cal. 349 ; 37 Bom. 340).

It is not the form in which the manager sues which determines his capacity to sue on behalf of the joint family, but the fact that nobody except him has the right to interfere in the business of the joint family, or to give a valid discharge or a receipt for a debt due to or from the joint family, which confers that capacity on the manager. It is, therefore, the question of fact whether he is the manager or not, and not the form in which he sues, which determines the question (38 I. A. 45 explained in 12 Lah. 428). In order that a decree against the manager should bind the coparceners not parties to the litigation it is not essential that the pleadings should expressly state that he was suing or being sued as the manager. Where the manager has contracted debts for family purposes and is sued in respect of those debts, there is a presumption that he is sued in a representative capacity, so that a decree against him will be binding on all the coparceners (43 Bom. L. R. 807). If there are circumstances on the record which point to the conclusion that the members of a Hindu family are fighting their cause in their individual rights, the principle of Hindu law that the manager of a Hindu family can effectively represent the whole family in family transactions does not come into operation (A. I. R. 1944 Lah. 76, F. B.).

The exceptions to the above rule, that the manager alone has the capacity to represent the joint family in litigation, are :—

1. Where a transaction has been entered into in the names of two or more persons of the joint family, they must all join as plaintiffs in the suit (6 Cal. 815 ; 14 All. 579, *vide* 33 All. 272).

2. Suits on promissory notes (*vide infra*).

Promissory Note. The members of a joint Hindu family cannot be held liable in a suit filed on a promissory note signed by one of its members in his individual capacity even though the maker of the promissory note may be proved to be the manager of the family (25 Bom. L. R. 151 ; 32 Bom. L. R. 1035). "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable

document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand" (*Sadasukh Janki v. Kishan Prasad*, 46 I. A. 33). The other members of the joint family would only be bound by a promissory note or bill of exchange signed by the *karta* for family purpose, if the name of each member of the joint family to be charged appears on the instrument itself and is disclosed in such a way that on any fair interpretation of the document his name is the real name of the party liable under the bill (54 Cal., 380). A debt contracted under a promissory note signed by a *karta* for family purposes does not attract the Hindu doctrine of family responsibility for family debts, and such a doctrine is incompatible with the object and effect of the law relating to negotiable instruments. The creditor may, however, proceed against the joint family as a whole for the amount of original debt for which the promissory note was given as a security, but the coparceners will then be entitled to plead as a defence that the debt was not contracted for purposes of necessity (*ibid*). Similarly, if during the lifetime of a Hindu father a suit is laid on a promissory note executed by him alone, his sons cannot be made parties to it. But a suit can also be laid on the debt impleading the sons as parties thereto so as to render their shares in the joint family property liable (A. I. R. 1941 Mad. 772, F. B.). A promissory note passed by a Hindu can after his death be enforced against his sons or grandsons, who are liable only to the extent of the estate, whether joint family or self acquired, of the deceased which has come to their hands (34 Bom. L. R. 1005).

Conversely, as regards suits on a promissory note passed in the name of one coparcener, on the death of this coparcener the surviving coparcener, who becomes entitled by survivorship to the joint family property, cannot sue on it. It is only the legal representative of the deceased coparcener who can do so. A surviving coparcener does not represent the estate of the deceased member of the joint family. He gets the property by survivorship in his own right and not as a representative of the deceased (*Kamalakant v. Madhavji*, 37 Bom. L. R. 405.). Where, however, a promissory note is passed in the name of a Hindu family firm, the coparceners carrying on the joint family business can sue to recover the debt on the promissory note (42 Bom. L. R. 248).

§ 70. Alienation of coparcenary property. * The coparcenary property may be alienated by—

- (1) the whole body of coparceners, where they are all adults ;
- (2) by the manager (*vide supra*) ;

* Who can alienate (i) the coparcenary property and (ii) the undivided coparcenary interest, and to what extent? (April 1933.)

- (3) by the father in cases mentioned below ; and
- (4) by the sole surviving coparcener.

A person, who is the sole surviving coparcener for the time being, can dispose of the entire property as if it were his separate property. The subsequent birth of a son cannot invalidate the alienation, whether it be by way of mortgage, sale or gift. But as a will operates from the date of the testator's death, it will be inoperative so far as it deals with the ancestral property. In case the son dies in the lifetime of the testator, the will will not be affected at all.

Special powers of father. * The powers of a Mitakshara father as a *karta* of the family to bind his infant sons with regard to disposal or management of joint family properties are wider than those of other *kartas* of such families, and rest upon an implied consent on the part of all the other members and a presumption that what is done is for the benefit of the family (55 Cal. 210).

The father possesses the following special powers of alienating coparcenary property :—(1) He has the power of making *within reasonable limits* gifts of ancestral *movable property*, without the consent of his sons, for the purpose of performing "indispensable acts of duty, and for purposes prescribed by texts of law, such as gifts through affection, support of the family, relief from distress and so forth." A gift of affection is a gift of a small portion of the properties to a near relative, such as a daughter, son, son-in-law, daughter-in-law, *etc.* A gift of the whole, or almost the whole, of the ancestral movable property to one son to the exclusion of the other sons cannot be upheld as a gift through affection (5 Bom. 48, P. C.).

(2) He has a power to make a gift of ancestral *immovable* property *within reasonable limits* for "pious purposes." The father's power to make a gift of ancestral property to a reasonable limit in favour of one son to the exclusion of other sons, extends only to moveable property. In case of immoveable property the gift must be for a pious purpose (A. I. R. 1938 Lah. 113). But the father must exercise each of these powers by an act *inter vivos*, and not by a will (54 I. A. 136). A will speaks from

* What are the powers of the Hindu father, as such, to alienate joint family property? (Oct., 1932.)

the death of the testator, and then the son's right to take by survivorship predominates over the dispositions in the will of ancestral property. A father is not at liberty to make a gift, even for life, of a small portion of the joint family *immovable* property to his daughter on the ground that she looked after him in his old age and he had great love and affection for her (37 Bom. L. R. 484). In the Madras Presidency a gift of land to the son-in-law on the occasion of his marriage with the donor's daughter is upheld on the ground of a long-standing custom (22 Mad. 113; 17 Mad. L. J. 528).

(3) He has the power to sell or mortgage the *whole* ancestral property, movable or immovable, including the interest of his sons, grandsons and great grandsons for the payment of his personal debts, provided they are antecedent debts, not contracted for immoral or illegal purposes (*vide* § 138, *infra*). But the father is not entitled to alienate the joint family property so as to bind the sons' interest, when it is not made either for a legal necessity or for paying his antecedent debts. If the debts for which the alienation is made by him are not antecedent debts, the inability of the sons to show that the debts were immoral does not affect the question, and the alienation would not bind the sons' interest (40 Bom. L. R. 946).

§ 71. Alienation of undivided coparcenary interest.

(1) *Private or voluntary alienation.* According to the Bombay, Madras and C. P. Courts, a coparcener can sell, mortgage or otherwise alienate *for value* his interest in coparcenary property. He cannot make a gift of it, except with the consent of other coparceners. Thus, where a Hindu coparcenary consists of two members only, it is open to one of them with mutual concurrence to gift his share in the undivided property to the other coparcener (*Gundayya*, 1936, 38 Bom. L. R. 1095). * But in no case he can dispose of it by will, as a will speaks from the date of the testator's death, and the title of coparceners by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate (*Lakshmi Chand v. Anandi*, 53 I. A. 123). Thus a will made by a father even with the con-

* Is the will of a Hindu coparcener, disposing of his undivided coparcenary interest, a valid and enforceable disposition? (April, 1932.).

sent of the son was held to be invalid (*Bhikhabhai v. Parshotam*, 50 Bom. 558).

Under the Mitakshara law as administered in Bengal and the U.P., a coparcener cannot alienate his undivided interest at all, not even for value; such an alienation is invalid except where it is with the consent of the other coparceners (14 Lah. 584), or in the absence of such consent, it is for a legal necessity or by the father for payment of his antecedent debts. An alienation, which cannot be supported on these grounds, is not unlawful or void *ab initio*, but is merely voidable at the option of the other coparceners, who alone are affected by his unauthorised act (19 Cal 123, P. C.). No person, who is a stranger to the family and who does not possess a right to have the transaction defeated on other ground (e.g., of fraudulent transfer under S. 53 of the Transfer of Property Act), has a *locus standi* to intervene and impugn it (1935, 16 Lah. 714).

(2) *Alienation in execution of a decree.* According to the Mitakshara law, as administered in *all the provinces*, the undivided interest of a coparcener is liable to be taken in his lifetime in execution of a decree against him for his separate debts (*Deen Dyal v. Jagdeep*, 4 I. A. 247). The interest may be attached and sold during the coparcener's lifetime. But it cannot be sold after his death, unless it has been attached in his lifetime, because it is only an attachment during the lifetime of a coparcener which can defeat the right of the surviving coparceners to take by survivorship (*Suraj Koer v. Sheo Pershad*, 6 I. A. 88).

Effect of sale. The sale of a coparcener's interest does not by itself affect his status as a member of the family, and he retains his right to take by survivorship the interest of a deceased coparcener (A. I. R. 1937 Mad. 131).

§ 72. **Rights of purchaser of coparcener's interest.** The purchaser of specific property, or of undivided interest of a coparcener, or all the joint family properties, either by a private sale or a sale in execution of a decree, has the following rights and remedies:—*Right of joint possession.* According to the Bombay High Court, if the purchaser *has obtained possession*, the non-alienating members are entitled to *joint* possession of the property, and may sue for it without asking for partition. They may also sue for *exclusive* possession, but the Court is not

bound to eject the purchaser, and may in its discretion declare that the purchaser is entitled to hold the property until partition; each case is, however, to be decided on its own merits (*Bhau v. Budha*, 50 Bom. 204). If the purchaser has *not obtained possession*, and is not a relative but a stranger, he would not be given joint possession with the other coparceners, but would be left to his remedy of a suit for a general partition.

(2) *Right to partition.* A purchaser from a member of a joint family does not acquire a right to be considered a member of the joint family in place of the vendor, or a right to have joint possession of the family property in place of the vendor, nor does he acquire any right to possession of any specific part of the property, that being a right which the vendor himself did not possess. The only right which the purchaser has in such a case is to sue for partition and claim to be allotted to himself the share which would have gone to his vendor (41 Bom. L. R. 631). If a member of the family wishes to take his share there must be a partition of the whole estate. In the same way a person who has acquired the interest of a member of a joint family in the family properties must, when he wishes to enforce his rights, institute a suit for partition of all the assets, and the value of the share acquired would be arrived at after making provision for payment of the debts of the family (A. I. R. 1942 Mad. 554, F.B.). The purchaser can enforce his rights by a *general* partition, and not by a partition of the specific property alienated to him (46 Bom. 925). The non-alienating members can sue the purchaser for the partition of the specific property alienated to him, and need not sue for a general partition (43 Bom. 13). But an individual member cannot sue the purchaser only for his share in the property alienated (2 Pat. 925). In a suit by the non-alienating coparceners against the purchaser for partition of the property alienated to him, the purchaser cannot, by way of a counter-claim, ask for a general partition; he must bring a separate suit of his own for this purpose (50 Mad. 320).

* The alienee of a specific property or of the undivided in-

* What are the equitable rights of a purchaser of the undivided interest of a coparcener in a specific property in a suit for general partition? (Oct., 1932.)

Discuss the rights of a purchaser of a coparcener's undivided interest in the joint family property according to the Bombay School. (April, 1941.)

terest of a coparcener has, on a general partition, an *equitable* right to have that property, or his alienor's share in that property, as the case may be, assigned to him. But this right may be defeated, if the equities between the coparceners or liabilities attaching to the alienor's share render it inequitable or impracticable to do so (*Udaram v. Ranu*, 11 Bom. H. C. 76). The reason is that the purchaser takes the interest subject to all the charges, incumbrances and liabilities affecting it at the time.

The purchaser is not entitled to claim mesne profits between the dates of his purchase and the suit for partition. The share to which he is entitled is the interest to which the alienor was entitled *at the date of alienation*, and not the interest as varied by subsequent births or deaths in the family at the time when he seeks his remedy (41 Bom. 347; A. I. R. 1937 Mad. 631; 35 Mad. 47, F. B.). The purchaser may sue for partition even after the death of the alienating coparcener. In case such a coparcener dies before completion of the sale, the purchaser's right to enforce specific performance of the contract of sale is not affected.

The same principles apply to the case of a *mortgagee* from a coparcener (35 Bom. L. R. 132). Where a specific property belonging to the joint family has been mortgaged by a coparcener, and at a partition between the coparcener, that property is allotted to another coparcener, the mortgagee, in absence of proof of fraud or collusion, has no right against the property. His remedy is to enforce his claim against the property which comes to the share of his mortgagor.

§ 73. **Insolvency of coparcener.** A joint Hindu family as such cannot be adjudged insolvent. An individual member, or two or more members of such a family if an act of insolvency can be brought home to them jointly may be adjudged insolvents (16 Pat. 724). Minor members of the family must be excluded in any case from insolvency proceedings started at the instance of either debtors or creditors. Their shares, however, would be liable if the debts in insolvency were for a family necessity (A. I. R. 1942 Lah. 121). * On the insolvency of a coparcener, his separate property and undivided interest in coparcenary property vests in the Official Assignee (or the Official Re-

* Discuss briefly the effect of insolvency of a manager, a father, or any other coparcener, on the property of a joint Hindu family. (April, 1930.)

ceiver under the Provincial Insolvency Act). Where, therefore, one of the coparceners of a joint family becomes insolvent, the Official Assignee (or Receiver) can sell the right, title and interest of such coparcener in the joint family property and the purchaser's remedy is to compel partition as against the other members. The actual shares of the coparcener and of the other members in the family need not be determined at the time of the sale by the Official Assignee, but can be determined at the time of the partition (A. I. R. 1933 Lah. 651). A minor member of a joint family firm cannot as such be adjudged an insolvent. The Official Assignee or the alienee of the insolvent's share from him is entitled on the insolvency of any coparcener to joint possession with the other coparceners (46 Mad. 56 ; 51 Mad. 567). Under the Presidency-towns Insolvency Act, in case the insolvent member is the *manager* of the family, then besides his separate property and undivided coparcenary interest, his *power* to alienate the entire coparcenary property for debts binding upon the family will vest in the Official Assignee (*vide contra*. A. I. R. 1942 Cal. 533). Similarly, in case of the insolvency of the father, the *power* which he has to alienate his son's share in the coparcenary property for paying his personal debts, not contracted for an immoral purpose, vests in the Official Assignee (*Sat Narain v. Shri Kishen Das*, 17 Lah. 644, P.C.; *Sat Narain v. Behari Lal*, 52 I. A. 22). The power so vested does not terminate with the father's death, and can be exercised after his death. But the power subsists only so long as the family continues to remain joint. After partition, the Official Assignee cannot sell the son's share (*Balausami Ayyar*, In re. 51 Mad. 417). In such a case, he can institute a suit against the son for realising debts due to the father's creditors, and can enforce the decree in such a suit by selling the son's share. What vests in the Official Assignee is the *power to alienate* the son's share, and *not the share itself* (A. I. R. 1942 Cal. 533). The son's share may be attached, even after the insolvency of the father, by a creditor of the father, in execution of a decree against the father or against both the father and son, or by a creditor of the son in execution of a decree against the son. On such an attachment, the Official Assignee's power to sell the son's interest terminates (*Shripad*, 49 Bom. 785 ; 59 Mad. 296). But the Madras High Court has held that under the Provincial Insolvency

Act, which does not contain any section corresponding to section 52 (2) (b) of the Presidency-towns Insolvency Act, the power of the manager to alienate the entire coparcenary property for debts binding upon the family, or of the father to sell the interests of his sons in the properties of the joint family for discharge of his debts does not, on his adjudication as an insolvent, vest in the Official Receiver and the Official Receiver has no right to sell the interests of other coparceners or the sons in any of the items of the family property (*Ramasastrulu v. Balkrishna Rao*, I. L. R. 1943 Mad. 83, F. B. ; I. L. R. 1944 Mad. 212).

The filing of an insolvency application, whether by a creditor of a coparcener or by the coparcener himself, does not bring about a severance of the joint family status. Nor does the adjudication of a coparcener as an insolvent bring about any severance in the joint family status of the coparcener (*Venkatarayudu*, 53 Mad. 126).

§ 74. Who may object to alienations. Where an alienation is made by a coparcener in excess of his powers it may be set aside by another coparcener, who was in existence at the time when the alienation was completed, and did not assent to it, a person in the womb being regarded as an existing person for this purpose (20 Mad. 354 ; 37 All. 162 ; A. I. R. 1942 All. 444). An alienation, valid when it was made, cannot be impeached by a person subsequently born, if he was not *conceived* at the time (34 Cal. 372). Thus, an alienation by a sole surviving coparcener is valid though made without legal necessity, and hence it cannot be objected to by his son born after the date of the alienation (47 All. 995). But an alienation made by a father who has then sons living, not being one for legal necessity, or payment of an antecedent-debt, and if made without their consent, may be set aside by one of these sons. It would be set aside partially, that is, in so far as his interest is concerned in Bombay, Madras and the Central Provinces. It would be wholly set aside in Bengal and the United Provinces. If all the sons living at the date of the alienation predecease the father and no other son is born before the death of the last of them, the alienation is not liable to be set aside by an after-born son (149 I. C. 50). If before the sons alive at the time of the alienation are dead, another son is born, then according to the law in Bengal and the

U. P. the alienation may be set aside at the instance of the after-born also, unless before his birth the pre-existing sons have ratified it or their cause of action has been barred by limitation (44 All. 190 ; 2 Lah. 114 ; 47 All. 165 ; 20 Pat. 727). Alienation by one member of a joint family is voidable only at the option of other members and not by the member who made the alienation or his transferees (A. I. R. 1940 Pat. 95). On setting aside of an unjustifiable alienation, the person to be dispossessed is entitled to sums paid by him towards mortgages binding on the estate and also for reasonable improvements to the estate (45 Bom. L. R. 462). A sale of joint family property was made by the father and manager of the family. The sale was found not to be justified by necessity. Nevertheless the recovery of possession by the sons and grandsons from the purchaser was made conditional on repayment of that part of the consideration for which legal necessity was established (52 All. 391). The period of limitation for setting aside an alienation by the father is 12 years from *the date when the alienee takes possession of the property*. The subsequent birth of a son does not create a fresh cause of action or a new starting point for limitation (47 All. 165, P. C.). The cause of action to set aside an alienation arises at the time of the alienation, and no fresh cause of action arises on the birth of a further coparcener (45 Bom. L. R. 507). But the bar of limitation against an elder son does not operate as a bar against his younger brother, who was in existence at the date of alienation, because a minor brother can claim the benefit of his minority for extension of the period of limitation (48 All. 152).

Chapter VII

DAYABHAGA JOINT FAMILY

§ 75. **Dayabhaga law different.** The conception of a joint family under the Dayabhaga law is entirely distinct from that under the Mitakshara law. The next section deals with the principal points of difference between the two systems in this branch of law. It should be noted that where the Dayabhaga is silent, the rules of the Mitakshara are to be applied so far as they are applicable (*Moottoo Rambalinga's case*).

§ 76. Distinguishing features. The distinguishing features of a Dayabhaga joint family are the following :—

(1) The essence of a coparcenary under the Dayabhaga law is the unity of *possession*. There is no unity of *ownership* according to this law, as the ownership is not in the whole body of coparceners. Every coparcener takes a *defined share* of which he is the absolute owner, with independent rights of disposition even by gift or will, in the same way as in the case of his separate property. As the share is defined from the beginning, it does not fluctuate by births and deaths in the family. The only sense, therefore, in which the word coparcenary is used, is that the persons who are described as coparceners jointly *possess* the family property.

(2) The acquisition of an interest in coparcenary property is not by birth but by the death of the previous owner. No person, not even the son, acquires an interest by birth in the ancestral property. Hence there can be no coparcenary, in the strict sense of the term, between a father and his sons (60 Cal. 125). The sons become entitled to the ancestral, as in the case of the separate, property of the father on his death. Necessarily, therefore, the sons have no right of partition or to accounts from the father.

(3) All property under the Dayabhaga law passes by succession. There is no *right of survivorship*. As a coparcener takes a defined share, his share will, on his death, pass to his *heirs* according to rules of succession.

(4) Even *females*, who succeed to the share of a deceased coparcener, can be members of a Dayabhaga coparcenary. Thus a widow or a daughter, who succeeds in absence of male issue, can be a coparcener with the male members. But even under the Dayabhaga law, a coparcenary cannot start with females. Thus if a person dies leaving two widows or daughters they cannot constitute a coparcenary. A female coparcener can sue for partition (A. I. R. 1940 Cal. 33).

(5) As every coparcener takes a defined share, partition, in the Dayabhaga law, means *separating* the shares of coparceners and assigning to them *specific portions of the property*.

CHAPTER VIII

PARTITION (Mitakshara Law)

§ 77. What is partition? "Partition is the intentional severance of coparcenary property by members of a joint family." According to the Mitakshara, partition is "the adjustment into specific portions of diverse rights of different members accruing to the whole of the family property." It effects a *severance of the joint status* and community of interest. * The partition of a joint estate, under the Mitakshara law, consists in defining the shares of the coparceners in the joint property. It is not necessary that there should be an actual division of the property by metes and bounds (*Anurago v. Darshan*, 40 Bom. L. R. 758, P.C.). Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and thenceforth the parties hold it as tenants-in-common. In other words, the rights to take by survivorship is extinguished (40 Bom. L. R. 1068, P. C.). Partition is a matter of individual volition and reduces the members to the position of tenants-in-common, *requiring only a definite unequivocal intention on the part of a member to separate and enjoy his share in absolute severalty* (*Girja Bai v. Sadashiv*, 43 I. A. 151). No consent of the other members, nor a decree of a court or any other writing is necessary for partition. "The true test of partition of property, according to Hindu law, is the intention of members of the family to become separate owners" (*Appovier v. Rama Subba*, 11 M. I. A. 75). A member of a joint family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declarations of a fixed intention to become separate, even though he goes on living jointly with the other members of the family and there is no division of property (*Bal Krishna v. Ram Krishna*, 53, All. 300, P. C. ; *Ramasray v. Radhika*, 38 Bom. L. R. 120, P. C.). The intention to become separate, which is expressed, should be a genuine and not a sham one in order that it may

* What is necessary to constitute partition? (April, 1933.)

Explain clearly what is meant by partition. Discuss, in brief, different modes of effecting the same. (April, 1942.)

have the effect of severing the status. Coparceners who intend to remain joint and undivided do not become divided contrary to their intention because in a document for purposes of pretence they refer to their interests as represented by a fractional share (43 Bom. L. R. 850, P. C.). No question of a transfer of title arises under a partition. Each coparcener has complete title to, and dominion over, every parcel of the joint estate. Partition is consequently only a change in the mode of enjoyment of the joint property, coupled with an alteration in status, the joint title being divided in a number of separate ones (A. I. R. 1941 Nag. 209; A. I. R. 1943 Mad. 43, F. B.).

A partition must be distinguished from a *family arrangement*, settling the mode of enjoyment of the family property, as such an arrangement does not put an end to the joint status. It is possible for members of a joint family to divide the property among themselves for the purpose of convenient enjoyment or management without the intention of making a partition (A. I. R. 1942 All. 267).

§ 78. Property liable to partition. * *Prima facie* all coparcenary property is liable to partition. The following properties, however, are not liable to partition :—

(1) Impartible property, i.e., property which descends to one member only, either by custom, or under any provision of law, or by the terms of its grant (*vide* Ch. XVII).

(2) Property indivisible by nature, such as animals, furniture, etc., and property which cannot be divided without destroying its intrinsic value. In such a case, the property may be sold and its value distributed, or a money compensation may be paid to coparceners other than those to whom it is given (10 Cal 675). In the case of a well, it may be enjoyed by coparceners by turns or jointly. As to a right of way, it will be presumed to have remained joint, in the absence of evidence that it was allotted to a particular member at the time of partition (36 Bom. 379).

(3) Family idols and relics which are objects of worship, being construed in law to be juridical persons, are incapable of

* What kinds of properties are liable to partition among coparceners? (Oct., 1927.)

What property, according to the Mitakshara law, is available for partition and who are entitled to a share in it? (April, 1943.)

division. But if the parties agree to a division, there is no objection to effecting a partition upon the terms agreed. In other cases, the parties after partition will continue to offer their services by turns (17 Bom. 271). But in the absence of dedication, a building for worship of the family idol cannot be excluded from partition merely because it is used for the worship of the idol. The Court may in such a case give an option to a coparcener willing to maintain the building as a place of worship to buy it at a valuation (39 Bom. L. R. 94).

(4) Separate property of a member.

From the property *liable* to partition, provision must first be made for (1) debts which are payable out of the joint family property, (2) personal debts of the father, not tainted with immorality (*Sat Narain*, 38 Bom. L. R. 1129, P. C.), (3) maintenance of disqualified heirs and female members, and (4) marriage expenses of unmarried daughters. In the case of a partition between brothers, provision must also be made for the funeral ceremonies of the widowed mother. Though the marriage expenses of *male* members, so long as the family continues joint, must be paid out of the family funds, no provisions for them can be made after the institution of a suit for partition (30 Bom. L. R. 45). The institution of a suit operates as a severance of a joint family, and any expenses, as regards such marriages, *between the institution of a suit and the decree*, would fall upon the share of a person concerned, and no obligation rests upon the other members in respect thereof (*Ramalinga v. Narayan*, 49 I. A. 168). After the severance of joint family status has been effected, no obligation rests on the joint family in respect of the future marriage of a coparcener who was unmarried at the time of the severance (1935, 58 Mad. 126).

No charge will be made against a coparcener, because a larger share of the family income was spent on his family in consequence of his having a larger family to support (5 Beng. L. R. 347). Partition must be made of such property as is available at the date of partition (28 Bom. 201). A coparcener is not entitled to demand mesne profits, except in case (1) he was *entirely excluded* from the family property (7 I. A. 38), or (2) an arrangement had been made between the members to enjoy the

property in specific and distinct shares, and his enjoyment of the share so allotted to him was disturbed (16 Cal. 397).

§ 79. **Persons entitled to sue for partition.** Though every coparcener is entitled to a *share* on partition, the right to *enforce or sue for* a partition is a qualified right. Every *adult* coparcener can sue for partition at any time. * But in Bombay, a son is not entitled to sue his father for partition against his will, if the father is joint with his own father, brother or other coparceners (*Appaji v. Ramchandra*, 16 Bom. 29).

† In the case of a suit for partition by a *minor* coparcener, a court will not pass a decree for partition unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from danger (19 Bom. 99). It will be for the minor's interest that family property may be partitioned, if an adult coparcener, who is in possession of the property, is wasting it, or sets up an exclusive title, or refuses to provide for the minor's maintenance. But though a minor cannot, except in the circumstances mentioned above, sue for a partition, his minority is no bar to other coparceners coming to a partition, and the partition cannot be set aside by the minor on his attaining majority, except when it is *unfair or prejudicial to his interest* (*Balkishan Das v. Ramnarain*, 30 I. A. 139).

A purchaser of the undivided coparcenary interest of a coparcener *at a sale in execution of a decree* can demand a partition, as also, according to the Bombay and Madras schools a purchaser of an interest of a coparcener by a private alienation.

Persons entitled to a share. All coparceners, unless they are disqualified on any of the grounds mentioned in Ch. XI, are entitled to a share on partition. A son *begotten* at the time of partition, though born after partition, is also entitled to a share, as if he were in existence at the time of the partition (12 Bom. 105). But in the case of a son *begotten as well as born*

* Discuss the rights of a Hindu son to demand a partition of the joint ancestral property from his father. Cite authorities. (March, 1923.)

† Shortly state the circumstances under which a suit for partition can be filed on behalf of a minor coparcener. (April, 1932.)

Enumerate the persons who can claim partition of joint family property under the Mitakshara law, and narrate their respective rights. (April, 1944.)

after partition, he is not entitled to a share, except where the father has *not reserved* a share to himself (20 Mad. 75). If the father *has* reserved a share to himself such a son is entitled to inherit that share and also the father's separate property to the entire exclusion of separated sons (4 All. 427). An adopted son has got the same rights as a natural born son, unless he is adopted by a disqualified person. An absent or missing coparcener will be represented by his issue.

* An *illegitimate* son is entitled only to maintenance in the case of the three regenerate classes (*Roshan Singh v. Balvant Singh*, 27 I. A. 51). In the case of Sudras, an illegitimate son is entitled to certain rights of inheritance and a share on partition, *provided he is a dasiputra* (vide p. 32). "The illegitimate son of a Sudra by a continuous concubine has the status of a son and he is a member of the family" (*Vellaiyappa v. Natarajan*, 33 Bom. L. R. 1526, P. C.).

The rights as a *dasiputra* in the property of his Sudra father are governed by the following rules :—

(1) Unlike a legitimate son, an illegitimate son does not acquire any interest in the ancestral property in the hands of his father, nor does he form a coparcenary with him; so that during the lifetime of his father, the right of the illegitimate son is only limited to maintenance. But the father may, in his lifetime, give him a share of his property, even a share equal to that of the legitimate sons (9 Rang. 260).

(2) On the father's death, however, he succeeds to his estate as a coparcener with the legitimate son of his father, and he is entitled to enforce a partition against the legitimate son. Thus, where a Sudra left two sons, one legitimate and the other illegitimate, and the legitimate son died before partition of the estate with the illegitimate son and without leaving male issue, the illegitimate son was held entitled to the whole estate by the right of survivorship (*Sadu v. Baiza*, 4 Bom. 37, P. F., *Jogendra v. Nityanand*, 17 I. A. 128). If there be no legitimate son, but there are more than one illegitimate son, such illegitimate sons

* Discuss the legal status of an illegitimate son under Hindu law. (April, 1929.)

What right has an illegitimate son to sue for partition? (Oct., 1932.)

would form a coparcenary in the estate of the father. Hence, it was held that on death of a Sudra leaving two illegitimate sons, the two illegitimate sons formed a coparcenary, and the will of one of the brothers affecting the coparcenary property was invalid (*Samu v. Bapu*, 30 Bom. L. R. 438).

(3) On a partition between an illegitimate son and a legitimate son, the illegitimate son takes only a half of what he would have taken if he were legitimate, *i.e.*, on a partition between a legitimate son and an illegitimate son, as the illegitimate son would have taken $\frac{1}{2}$, if he had been legitimate, he would take, being illegitimate, a half of this $\frac{1}{2}$, so that the legitimate son is entitled to $\frac{3}{4}$ ths and the legitimate son to $\frac{1}{4}$ th (*Kamulam-mal v. Visvanathswami*, 50 I. A. 32).

(4) If the father was joint at his death with his collaterals, *e.g.*, his brothers or their sons, or his uncle and his sons, the illegitimate son is not entitled to demand a partition of the joint family property, but he is entitled as a member of the family to maintenance out of such property, provided his father left no separate estate (*Vellaiyappa v. Natarajan*, 33 Bom. L. R. 1526, P.C.). "His position in this respect is analogous to that of widows and disqualified heirs to whom law allows maintenance because of their exclusion from inheritance and from a share on partition."

The above law concerning the right of an illegitimate son of a Sudra is based upon the following text of the Mitakshara :—"The son begotten by a Sudra of a female slave (*dasiputra*) obtains a share by the father's choice or at his pleasure. But after (the demise of) the father, if there be sons of the wedded wife, let his brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as the amount of one brother's) allotment" (Mitakshara, Chap. I, Sec. 12, para 2).

The mere giving away by a Sudra father of anything by way of gift or maintenance to his illegitimate son is not to be taken as effecting a complete extinction of the son's rights or as effecting a partition between the son and the father. A Sudra Hindu, who had sons by his wife as well as sons and daughters by a continuously kept mistress, gifted a portion of his self-acquired property to his mistress and her children for their maintenance. It was held that the deed of gift did not effect a partition between the legitimate and illegitimate sons, and that the illegitimate sons were entitled to recover their share on equitable partition from the legitimate sons (*Sakharam v. Shamrao*, 34 Bom. L. R. 191).

Female sharers. The only females, who take a share on partition, are (1) the wife, (2) widowed mother or step-mother, and (3) widowed grand-mother or step grand-mother. But in the Madras Presidency, the practice of allotting a share on partition to females has become obsolete. These female sharers cannot demand a partition; their right extends only to get a share in case the male coparceners come to a partition (52 All. 596). Again, these female sharers cannot claim a share upon a mere severance of the joint status of the family; they are entitled to do so when the family property is *actually* divided, and till that is done they cannot be recognised as owners of their shares. The reason is that they have no pre-existing right in the estate except a right of maintenance (*Pratappmull v. Dhanabati*, 63 Cal. 691, P.C.). The *stridhana* received by them from their husband or father-in-law will be deducted from their shares (31 Bom. 54). The share allotted to a female on partition is not her *stridhana*, unless it appears that it was given to her absolutely. Again the share allotted to a woman is in lieu of maintenance; hence, if a partition makes provision for her maintenance in lieu of her share, she cannot maintain a suit for her share (A. I. R. 1927 Oudh 136).

(1) On partition between the father and his sons, the *wife* takes a share equal to that of a son, even if the son be her step-son. If there are more wives than one, each will count as equal to a son. The wife can enjoy her share separately even from her husband (48 Bom. 468). The title of the wife to her share crystallises in a case of division between her husband and sons by metes and bounds, and the fact that she did not actually divide her share from her husband's share is immaterial (A. I. R. 1940 Nag. 241).

(2) On a partition between sons, after the father's death, the *mother* also receives an equal share (17 Bom. 271). She gets a share even if the partition is between her sons and the purchaser of the interest of one of them (3 All. 88). In case, there are sons by different mothers and *more than one mother is alive*, the rule is to divide the property into as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them (13 Cal. 39). Thus, suppose a person dies leaving two widows A and B, and two sons by A and three sons by B. On a partition be-

tween the sons, the property will first be divided into 5 shares corresponding to the number of sons. Then the two sons of A will share equally with her their $\frac{2}{5}$ ths share, each taking $\frac{2}{10}$ ths. Similarly, the three sons of B will share equally with her their $\frac{2}{5}$ ths share, each taking $\frac{3}{20}$ ths. If one only of the co-widows is living at the date of partition, the ordinary rule of equal division will apply (6 Lah. 457). The fact that a widow has no son does not affect her right to take an equal share with her step-sons and co-widow (17 Bom. 271). Thus, if a person dies leaving two widows A and B, and two sons by B only, on a partition between the sons, A will also get her share, *viz.*, one-fourth. The mother is entitled to her share even though only some of her sons separate and the others continue joint (17 Bom. 271 ; 45 Bom. L. R. 561).

(3) Under the Mitakshara law, the paternal *grand-mother* would be entitled to a share only if the partition is between her grandsons, her own sons being dead, or between collaterals, such as her son and her grandson by a predeceased son, *i.e.*, between an uncle and a nephew (39 Bom. 373 ; 54 All. 532). But there is a conflict of opinion as to whether she is entitled to a share on a partition between her son and that son's son. The Bombay and Allahabad High Courts have held that, under the Mitakshara law, on a partition between a father and his sons, the grandmother is not entitled to a share (*Jamnabai v. Vasudev*, 32 Bom. L. R. 48 ; 3 All. 118). The High Court of Patna, on the other hand, has held that, even in such a case, she is entitled to a share, her share being equal to that of her son (4 Pat. L. J. 38). Under the Daya-bhaga law also, she would be entitled to a share (8 Cal. 649).

Changes under the Hindu Women's Property Act, 1937. Under this Act, the widow of a deceased coparcener has the same interest in the joint family property as the deceased had at the time of his death, subject only to the condition that she gets in it only the limited interest known as a Hindu woman's estate. Further the Act specifically gives her the same right of claiming a partition as a male owner. Hence, (1) the Act enlarges the class of female sharers in including in it all the widows of deceased coparceners. Such a widow would get on partition the share which her husband would have taken, if he were alive, even though she may not stand in the relation of a mother or a grand-mother to the separating male coparceners. Thus, for

example, a deceased brother's widow or a deceased paternal uncle's widow, if the brother or the paternal uncle had died as an undivided member of the coparcenary, would be entitled to a share and get the share of her deceased husband. (2) If the deceased has left two or more widows, the widows would jointly take the share of the deceased. This would in effect abrogate the rule of division mentioned in 2 above. For example, if a coparcener has died leaving two widows A and B, and two sons by A and three sons by B, instead of the division mentioned in 2 above, each of the five sons and the two widows jointly would take a one-fifth share, as the deceased himself would have done. (3) Under the Act the widow of the deceased coparcener herself is entitled to demand and, if necessary, sue for a partition just as any other male coparcener. The Act, however, applies to properties other than agricultural land (*vide* § 59A). A widow, who is entitled to share in the partition by virtue of this Act only, would not be entitled to her husband's interest in the joint family agricultural land. Of course, the wife, the mother and the grand-mother, who are recognised as the sharers under the Hindu law from before the passing of this Act, have the right to share in the agricultural lands of the family under the Hindu law, and this right is not affected by the Act.

§ 80. **Agreement not to partition.** An agreement between coparceners not to partition coparcenary property does not bind even the parties thereto, according to the Bombay High Court, and any party may, notwithstanding the agreement, sue the other parties for partition (*Ramalinga v. Virupakshi*, 7 Bom. 538). The High Courts of Calcutta and Allahabad have held that such an agreement does bind the actual parties, though it cannot bind their heirs or the persons to whom they transfer their shares (28 Cal. 769 ; 42 All. 30). In a recent case, the Madras High Court also took the same view, and held that coparceners in a joint Hindu family can agree for consideration that for a certain time or until a certain event or for their lives they will not exercise their right to divide (1934, 57 Mad. 405). Under the amended Transfer of Property Act, Ch. II of that Act applies to the Hindus. If, therefore, the agreement not to partition comes within the mischief which Sec. 10 of the Act intends to avert, it will not be binding.

§ 81. Allotment of shares. There is an equal division in a partition between father and sons, or between brothers. If the members belong to different degrees, the principle of allotment of shares is to divide first *per stripes*, i.e., according to the branches in the family, but the members of each branch take *per capita* as regards each other. Thus, suppose a family consists of A, his two sons B and C, three grandsons by B and two other grandsons by a predeceased son D, the property will be first divided into four parts; one for each of A, B, C and D. The share of D will go to his sons in equal shares; while C, who has no issue, will take his share. The share of B will be again divided into four equal parts, one for himself and for each of his three sons.

The ordinary rule is that partition should be made according to the condition of the family as on the date of the suit. Hence, if some members of the family had separated before, on a subsequent partition between the remaining members, regard must be had to the state of the family as on the date of the second partition. This rule is followed by the Bombay High Court (*Pranjivandas v. Ichharam*, 39 Bom. 734). But according to the Madras High Court, regard shall be had to the shares, allotted on the first partition, in computing the shares to be allotted at the second partition (53 Mad. 1). Suppose in the case mentioned above, C and one of the sons of D separate from the family taking their shares $\frac{1}{4}$ and $\frac{1}{8}$ respectively. Then after some time, the second son of D demands a partition of the family. According to the Bombay High Court, the remaining $\frac{5}{8}$ ths will have to be equally divided into three parts, one each for A, and the branches of B and D. The share of D's branch will go to his remaining son who sues for partition. He will, therefore, get $\frac{1}{3}$ of $\frac{5}{8}$, i.e., $\frac{5}{24}$. But according to the Madras view, he will get the share which he would have got at the first partition, viz., $\frac{1}{2}$ of $\frac{1}{4}$, i.e., $\frac{1}{8}$.

§ 82. Partition how effected. Once a member of the coparcenary has clearly and unequivocally intimated to his coparceners his desire to sever himself from the coparcenary, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation, and there is immediate severance of the family (*Girja Bai v. Sadashiv*, 43 I. A. 151). Unilateral intention not communicated to the other members is not sufficient to effect a division in status (46 Mad. 349). The intention must

be definitely and unambiguously intimated to other members in order to effect separation (31 Bom. L. R. 1067). "No doubt the intention must be published in some way. An act of volition which is kept secret could not be legally effective. There would indeed be no evidence in the case that it was genuine. But no formal declaration or notice is required. The intention may be evidenced by conduct I do not think that anything more is essential than publication in the manner appropriate to the circumstances of the case" (*Dnyeshwar v. Anant*, 38 Bom. L. R. 579 ; A. I. R. 1941 Nag. 209). In that case, it was held that a declaration of intention to separate by an adult member of a joint family is effective against a minor coparcener, even if the latter happens to be the only other coparcener. The severance of status takes place from the date on which the communication of intention to separate is sent and not when the communication is actually received by the coparceners (A. I. R. 1938 Mad. 390). The intention to separate may be evinced in different ways either by express declaration, or by conduct, or by serving a notice on the other coparceners, or by instituting a suit for a partition, or by reference to arbitration. A severance of the joint status may result, not only from agreement of the parties, but from an act or transaction which has the effect of defining their shares, though it may not partition the estate (*Alluri*, 38 Bom. L. R. 1318, P. C.).

(a) **Partition by agreement.** Even though the property be not physically divided, *execution of an agreement* in writing to hold the property separately operates as a partition (*Appovier v. Rama Subba*, 11 M. I. A. 75). If such an agreement declares on the face of it the intention to separate, no evidence of the subsequent acts of parties to control or alter the legal effect of the document is admissible. If a document clearly shows a division of status, its legal construction and effect cannot be controlled or altered by evidence of subsequent conduct of parties (40 Bom. L. R. 1068, P. C.). If, however, the intention is not quite apparent, it may be gathered from the document and subsequent conduct of the parties (*Doorga Prasad v. Kundan*, 13 Beng. L. R. 235).

An agreement to separate, however, need not be in writing, nor is it necessary that there should be an actual division of the property by metes and bounds. Intention being the real test, it

follows that an agreement between members to hold and enjoy the property in *defined shares as separate owners* constitutes a partition, although there has been no physical division of the property (*Purnananthachi*, 1936, 38 Bom. L. R. 1247, P. C.). The two ideas, the severance of joint status and a *de facto* division of property, must be kept distinct. As partition under the Mitakshara law is effected on the severance of joint status, the allotment of shares may be done later. Where a covenant in a deed does not effect immediate severance of status, but postpones it to a future date, until that time comes there is no separation of interest, and the members hold the estate as joint tenants. If, during the interval, some members die without leaving any male issue, the stipulation as to shares will not take effect and the estate will be divided among a smaller number of coparceners, each of whom would get a larger amount than the stipulated share (*Purnananthachi's case*).

(b) **Partition by conduct.** Even in the absence of any writing, if the conduct of the parties is inconsistent with the continuance of a joint family, there will be a partition. It will be a clear case of partition if the members of a joint family *actually divide the joint family property by metes and bounds*, and each member is in separate possession and enjoyment of the share allotted to him. Cesser in commensality, though not conclusive proof of partition, is an important element which, if supported by other facts, may be sufficient (*Ganesh Dutt v. Jewach*, 31 Cal. 262). A mere ascertainment of shares of the members is not conclusive evidence of separation, but there is a presumption that there was a separation, and the burden of proving that, notwithstanding the ascertainment of shares of the various members of the family, the family continued to be joint is upon the person who alleges it (*Beti v. Sikhdar Singh*, 50 All. 186).

(c) **Partition by arbitration.** An agreement between the members of a joint family, whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement. The fact that no award has been made on the reference is not evidence of renunciation of the intention to separate (40 Bom. L. R. 1068, P. C. ; 8 Pat. 153).

(d) **Partition by registered notice.** As partition

merely requires an intention to separate, it can be effected by a registered notice, whether followed by a suit or not. If a suit is subsequently filed, the partition will be decreed as on the date of the registered notice. The conduct of parties, a formal notice and a plaint are merely the several methods, of more or less formality, for effecting the severance of the status and none of them is inferior to the other, if the intention be clearly indicated. But even when an unequivocal wish to separate is once declared by a notice, a separation will not be effected in law, if it be found as a fact that the intention was given up as the result of a subsequent agreement of all the parties, including the member demanding a separation, by which the notice was expressly or impliedly withdrawn (51 All. 519).

(e) **Partition by will.** Partition may be effected by a coparcener making a will containing a clear and unequivocal intimation to his coparceners of his desire to sever himself from the joint family or containing an assertion of his right to separate (58 I. A. 220 ; 44 I. A. 159). Thus, the words in a will that "I want to get myself divided and want to execute this will" were held sufficient to effect separation of status (A. I. R. 1927 Mad. 1066). But the head of a family cannot effect a partition by a will amongst the various members of the family *inter se*. The validity of such a will depends upon the acceptance of the arrangement by the members, and it will be given effect to as a family arrangement and not as a will (49 All. 763).

(f) **Partition by a suit** (*vide* § 82A, *infra*).

(g) **Partition by conversion** (*vide* § 83, *infra*).

§ 82A. **Partition by a suit.** The institution of a suit for partition by a member is an unequivocal indication of his intention to separate, and, therefore, there is a severance of the joint status from the date of the institution. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not (*Girja Bai's case*, 39 Mad. 159 ; 39 All. 496). But if the suit is withdrawn by the plaintiff before partition, there is no severance of the joint status, if the withdrawal can be explained as proceeding from a desire

not to separate (*Palani Ammal v. Muthuvenkatacharla*, 52 I. A. 83). In case of suits for partition brought on behalf of minors, the mere institution of a suit does not effect a severance, but if the suit is decreed in the minor's favour, the severance of the joint status relates back to the date of the institution (43 Bom. L. R. 807 ; A. I. R. 1943 Nag. 101 ; 57 Mad. 95 ; 42 All. 461). Hence, where after the institution of a suit for partition by a minor, a son is born in the family, the minor's share in the property as at the date of the institution of the suit remains unaffected by the birth of such a son (41 Bom. L. R. 195). If the partition suit on behalf of a minor is preceded by a notice given by the guardian of the minor and showing an unequivocal intention to separate, on a decree for partition being made, the separation relates back to the date of such notice (45 Bom. L. R. 1021). A suit by a minor for partition does not abate if he dies before the Court has found that the partition is for his benefit. It is open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor (57 Mad. 95, F. B.). The Patna High Court takes a contrary view that the mere institution of a suit by a minor effects his severance from the joint family as in the case of adults (4 P. L. J. 38).

As the mere institution of a suit by a member for partition puts an end to the joint status, his share is not liable to be diminished by subsequent births in the family. So also, the share of a coparcener, who dies pending the suit, passes to his heirs, and not to the surviving coparceners. But the share allotted to a female in the preliminary decree is not her Stridhana, and in case of her death before the final decree, her share remains part of the estate available for division among the coparceners, including even those born after the suit but before her death.

In a partition decree, provision must be made first for debts binding on the joint family, and then for maintenance of the female members and disqualified persons, who are excluded from sharing. If there be any equities between the parties they should be adjusted, and items alienated should be allotted, in so far as it may be possible to the alienor's share (A. I. R. 1943 Mad. 652). Normally each branch of the joint family must bear the expenses of the unmarried daughters of that branch after partition (A. I. R. 1943 Bom. 221).

Parties to the suit. All persons who are entitled (1) to

demand partition, or (2) to have a share on partition, including female sharers, or (3) to have a provision made for maintenance and marriage, and (4) alienees of the undivided interest, are necessary parties to a suit for partition.

The Patna High Court has held that in a suit for partition by a coparcener against his father and brothers or other collaterals, the sons of the brothers or collaterals are not *necessary*, though proper, parties, if their fathers are made parties.

§ 83. Conversion from Hinduism. The conversion of a member of a joint family to an alien religion, such as Mahomedanism or Christianity, effects his severance from the joint family, but not of the other members *inter se*. Such a convert no longer possesses the right of survivorship, as he ceases to be a coparcener from the moment of his conversion, and he takes his share in the family property as it stood at the date of his conversion (40 Cal. 407 ; 3 Pat. 152). The same rules apply to a coparcener who marries under the Special Marriage Act. The reconversion of the convert to Hinduism does not *ipso facto* bring about his coparcenary relationship in the absence of subsequent act or transactions pointing to a reunion (A. I. R. 1942 Mad. 193).

§ 84. The Partition Act, 1893. This Act authorises the Court to order a *sale* of the property to be partitioned, if (1) a division cannot be reasonably or conveniently made, and (2) the sale would be more beneficial to the sharers, and (3) the sharers representing a moiety or upwards of the family property request the Court to do so. It also authorises any member of the family, who is entitled to a share in the dwelling house, to buy a share in it transferred by another member to a stranger, at a valuation made by the Court.

§ 85. Partition by father. The father possesses a special power to effect a partition *between himself and his sons* (52 All. 178), even without their assent *and also of the sons inter se*. The father has the power to divide the family at any time during his life without the consent of his sons, and, if he makes a division it has the effect of separating, not only the father from the sons, but also the sons *inter se* (*Alluri v. Dantuluri*, 63 I A. 397 = 38 Bom. L. R. 1238, P.C.). This right is peculiar to the father alone ; a grandfather has no power to bring about a separation

among his grandsons. The partition so made by him binds his sons, not because the sons are a consenting party to it, but because it is the result of a power conferred on the father. (1) The father, however, must not disturb the ordinary shares to which the sons are entitled. In case the father gives unequal shares and the sons acquiesce in them, the transaction would be binding on them (*Brijraj Singh v. Shoedan Singh*, 35 All. 337). (2) The father can exercise this power only in his *life-time*; he cannot by his will direct a partition among his sons. Indeed no coparcener has such a power (40 I. A. 116).

But the document, purporting to be a will, may be in reality a family arrangement intended to operate from the date of its execution. Such a document may be good evidence of a family arrangement made at the time of its execution and acted upon by all the parties, and its effect would be to create a partition of the family property (*Brijraj Singh's case*).

§ 86. Partition should be complete. * Ordinarily a suit for partition must comprise all the joint property which is then capable of partition. "The ordinary rule undoubtedly is that there cannot be a partial partition, but it has been held that the rule is *elastic*, and has in several cases been departed from, if there is no inconvenience in a partial partition, apart from a final partition of the whole of the joint properties" (*Guran Ditta v. Ram Ditta*, 30 Bom. L. R. 1384). A partition may be partial *by mutual agreement* of the parties, but a coparcener cannot *by suit* enforce a partial partition against the other coparceners. A member suing his coparceners for partition of family property must bring into hotchpot all family property that may be in his own possession, whether within or without the local jurisdiction of the Court, provided the property is situated within British India. But the position of a purchaser from a coparcener is different (*vide* § 72).

There are several exceptions to the above general rule about partition. A partition may be partial as regards property or as regards persons making it.

* It is said that a partition according to Hindu law must be complete as regards the properties of the family and as regards parties entitled to a share on partition. State the exceptions, if any, to this rule. (April, 1927.)

(1) **Partial as regards property.** * Once there is evidence sufficient to satisfy the Court that the parties intended to separate, the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members hold it as tenants-in-common, unless and until a special agreement to hold it as joint tenants is proved (*Beni Persad v. Mst. Gurdevi*, 4 Lah. 252; *Dagadu v. Sakhubai*, 47 Bom. 773). The question in each case is one of intention. If a partition has taken place, the burden of proof lies upon the person who alleges that certain family property was excluded at that partition. If a party succeeds in proving that there was partial partition only, that fact is insufficient to establish that certain other parcels of property claimed as common must partake of the character of common property. It is a matter of proof and not presumption that such property was excluded and kept common (40 Bom. L. R. 202). In a partition between coparceners, a property may be excluded, if it (a) is impartible or (b) is held jointly with a stranger who has no interest in the family partition, or (c) is not in the possession of the coparceners, or (d) is already partitioned, or (e) is outside the jurisdiction of the Court.

† A case of partial partition would also arise when the undivided interest of a coparcener in a specific property belonging to the family has been alienated and all the non-alienating coparceners sue the alienee for their shares in that property. But such a suit is not maintainable by one only of the several non-alienating coparceners (see *contra* 28 All. 39). Nor can the alienee claim partition of the specific property alienated to him; his remedy is by way of a general partition. But a purchaser of the interest of one coparcener in a specific property can sue another purchaser for the remaining interest in the same property for partitioning that property only.

(2) **Partial as regards persons.** The case of partial partition as regards persons arises when only one or more of the

* What are the exceptions to the rule that every suit for partition shall embrace all the joint family property? (Oct., 1922.)

† When can a suit for partial partition be brought? (April 1933.)

Can partition of a portion of the joint family property be claimed in a Court of Law? If so, in what cases? (April, 1944.)

coparceners separate from the family, but there is no general partition amongst all the members. When one or more coparceners separate from the others, the question arises whether the latter are to be deemed to be *joint* or *reunited* or *separate*. There have been several Privy Council judgments in which this question has been considered, and the result of these judgments may be stated as follows :—

(1) The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. This presumption, however, does not continue after one member has separated from the others. As observed by the Judicial Committee, "There is no presumption when one coparcener separates from the others that the latter remain united An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact" (*Bal Krishna v. Ram Krishna*, 53 All. 300 ; *Ram Narayan v. Makhna*, 44 Bom. L. R. 1136, P.C.). It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them (*Palani Ammal v. Muthuvenkatacharla*, 52 I. A. 83), or it may be inferred from other conduct indicating such an intention (*Ram Persad Singh v. Lakhpatti Koer*, 30 I. A. 1). Thus, if one brother separate from the other brothers, there is no presumption that the latter remain united. It is a question of intention which must be proved like any other fact.

(2) When there has been a separation between the members of a joint family, there is no presumption that there was a separation between one of the members and his descendants. Thus, if two brothers A and B separate, there is no presumption that there was a separation between A and his sons, or between B and his sons (*Hari Baksh v. Babu Lal*, 51 I. A. 163).

(3) A Hindu father may separate from his sons, and the sons may remain joint or he may separate from his sons by one wife, and remain joint with his sons by another wife. Here

again, it is conceived, it is a question of their intention to remain joint which must be proved like any other fact (47 Mad. 567).

(4) Where in a suit a decree is passed for partition, and the question arises whether the separation effected by the decree was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other, the decree alone should be looked at to determine that question. It is the decree alone which can be evidence of what was decreed (*Palani Ammal's case*). But where the decree does not contain anything to sever the interests of the plaintiffs or defendants *inter se*, it cannot be conclusively said that they remained joint. In order to ascertain whether they remained joint or not, the conduct of the parties subsequent to the decree must be looked to (*Ram Narayan v. Makhna*, 44 Bom. L. R. 1136, P.C.).

The effect of partial partition may be summed thus : (1)

Partial as regards property.	Where coparceners in a joint Hindu family come to a partition and divide the joint property with the exception of a portion of it, they are, in the absence of any indication to the contrary, tenants-in-commons with reference to the excepted property, unless and until a special agreement to hold it as joint tenants is proved.
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(2) Partial as regards persons.	But where the partition is partial not in respect of the property but in respect of persons making it, so that some of the various joint tenants separate from the rest, it has been held by a long current of authorities, that the remaining coparceners, without any special agreement among themselves, may continue to be coparceners and enjoy as members of a joint family, the remaining property, and the question whether or not they continue to be joint or separate is to be determined on the evidence in each case (<i>Martand v. Radhabai</i> , 32 Bom. L. R. 927).
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Subsequent suit for partition. A subsequent suit for partition of the remaining family property is not barred by the principle of *res judicata*, even if the property was omitted from the former suit intentionally or through fraud or mistake. The reason is that claims for partition are separate causes of action in respect of the several properties.

§ 87. Reopening partition. * “Once is a partition made, once is a damsel given in marriage, once does a man say, ‘I give’; these three are by good men done once for all and irrevocably” (Manu). Partition once made cannot be reopened, except in the following cases :

(1) A son begotten, though not born before partition, can reopen it if a share has not been reserved for him.

(2) A son begotten as well as born after partition can demand a reopening of partition, if his father, though entitled to take a share, has not reserved a share for himself.

(3) A son adopted by a widow of a deceased coparcener is entitled to re-open a partition effected by the surviving coparceners after his adoptive father's death and before his own adoption (A. I. R. 1943 Mad. 43, F. B.).

(4) A disqualified coparcener can, on removal of the disqualification, reopen the partition; so also an absent or missing coparcener can on his return reopen the partition.

(5) A partition can be reopened by a minor on attaining majority, if the partition made during his minority was unfair or prejudicial to his interest (A. I. R. 1943 All. 197).

(6) If a coparcener has fraudulently obtained an unfair advantage in the division, or if the property allotted to a coparcener was stranger's property, or was subject to a charge and such a coparcener cannot be compensated for otherwise, the partition may be reopened for readjustment of shares. But where a portion of joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be joint property, and it must be divided amongst the persons who took a share under the partition. In such a case, it is not necessary to reopen original partition.

* “Once is a partition made” (Manu). Clearly explain this dictum, and point out the exceptions to this rule that have been recognised in modern Hindu law. (Oct., 1925.)

In what cases can a partition once made be reopened? (Oct., 1926.)

Under what circumstances can a partition be re-opened by an after-born son? (Oct., 1941.)

§ 88. **Reunion.** * “He who, being once separated, dwells again through affection with his father, brother or paternal uncle, is termed reunited” (Brihaspati). The Mitakshara, the Dayabhaga and the Smriti Chandrika (Madras School) take this text literally and say that a member of joint family once separated can reunite only with the father, brother or paternal uncle, but not with any other relation, as for instance, a paternal grandfather or paternal uncle's son, though such a relation was a party to the original partition. Hence, according to these authorities, a reunion can only take place between (1) a father and sons, (2) brothers, (3) a paternal uncle and nephews. Therefore, a reunion between cousins is inoperative and not valid in law (*Ram Narain*, 1935, 37 Bom. L. R. 144, P.C.). According to the Mayukha and the Mithila school, the words ‘father’, ‘brother’ and ‘paternal uncle’ are used in an *illustrative* sense, and a reunion can be effected between others, *provided they were parties to the original partition*. “A reunion in estate, property so called, can only take place between persons who were parties to the original partition” (*Balabax v. Rukhmabai*, 30 I. A. 130).

Thus, there are two conditions to a valid reunion under the Mitakshara : (1) Firstly, parties to a reunion amongst a Hindu family must have been parties to the original partition. (2) Secondly, according to the Mitakshara, a member of a joint family once separated can reunite only with his (i) father, (ii) brother or (iii) paternal uncle ; but not with any other relation.

In order to constitute a reunion, there must be evidence of an *intention* on the part of the parties to *reunite in estate and interest*. The burden of proof is heavily on the person alleging reunion to prove it (A. I. R. 1943 P.C. 106). The mere fact of living together at the same residence, or carrying on a joint trade, cannot constitute a reunion. There can be no reunion, unless there is an agreement between the parties to reunite in estate with the intention to remit them to their former status as mem-

* What is “Reunion” in Hindu law? Between whom and how can it be effected? What are its effects? (April, 1936.)

What do you understand by “Reunion” under Hindu law? How does it affect the rights of inheritance or survivorship amongst persons belonging to different schools of Hindu law? (April, 1944.) What is reunion according to the Mitakshara and the Mayukha? (Oct., 1941.)

bers of a joint family. Since a minor cannot contract, an agreement to reunite cannot be made by, or on behalf of, a minor.

A Hindu father and his minor son were members of a joint Hindu family. The father became a convert to Christianity in 1917 when his son was three years of age. Even after conversion he continued to regard himself as joint with his son. In spite of conversion the father continued to live as a Hindu and married his son to a Hindu girl. In 1928, he was reconverted to Hinduism. In 1930, during the minority of the son the father executed a mortgage of the family properties and in the same year the properties were brought to sale subject to the mortgage in pursuance of a money decree against the father. A question arose whether the son's interest in the family properties was affected by the mortgage or sale. It was *held*, that it was not affected by them. The embracing of Christianity by the father effected a division in status between him and his son. Once the family became divided, it could not be reunited without the consent of the son and during his minority he was not in a position to give his consent (I. L. R. 1944 Mad. 33).

The difference between a coparcenary formed by a reunion and coparcenary by birth is that the interest of a reunited member passes by succession and not by survivorship (*vide* § 105). The sons of reunited members will also be deemed to be reunited and are entitled to inherit to the reunited members in preference to descendants of the members who have not reunited.

CHAPTER IX

MITAKSHARA INHERITANCE TO MALES

The law of inheritance applies in three cases, *viz.*, (1) to the property of an individual who has separated from his coparceners, (2) to the self-acquired property of a coparcener, and (3) to all the property held by a sole surviving coparcener. If a person was, after partition, reunited at the time of his death, his property will pass to his heirs by succession according to special rules. The *stridhana* of a female also devolves by succession according to rules given in Ch. XII.

§ 89. General Principles. (1) An inheritance cannot remain in abeyance in expectation of the birth of a preferable heir, who was not conceived at the time when the owner died.

The right of succession must vest in the person who is the nearest heir at the time of the death of the owner.*

(2) The law of inheritance, being part of the law of the land, cannot be overridden by agreement or provision of a document altering the same (*Tagore v. Tagore*, 9 Beng. L. R. 377).

(3) The right of a person to succeed is a bare chance of succession, a mere *spes successionis*. Hence it cannot be the subject of a valid transfer. Any agreement entered into by a person as regards his right of inheritance cannot bind the persons who actually inherit when the succession opens.

(4) Males succeeding as heirs, whether to a male or a female, take absolutely. Females succeeding as heirs, whether to a male or a female, take a limited estate in the property, except in certain cases in the Bombay Presidency.

(5) *The last full owner* of the property is one who held the property absolutely at the time of his death. It is only a *full* owner who can become a fresh stock of descent. Except in the case of *stridhana*, and in certain cases in the Bombay Presidency, a female does not become the full owner of the property inherited by her, and hence, she cannot be a fresh stock of descent. On her death, the property inherited by her will pass not to her heirs, but to the next heirs of the male from whom she inherited it.

(6) A son, a grandson, whose father is dead, and a great grandson, whose father and grandfather are both dead, succeed simultaneously as one heir and form a coparcenary.† The reason why these succeed simultaneously, is that the grandson *represents* his father for a share, and the great grandson *represents* both his father and grandfather for a share, in the heritable property of the paternal ancestor. These acquire an interest by birth in the *ancestral* property in the hands of the ancestor, while to his *separate* property they succeed as one heir. Even when the father and the sons constitute a joint Hindu family, the sons succeed to the self-acquired property of the father by inheritance and not by survivorship. When two or more sons succeed as heirs to the self-acquired

* Comment on : "Inheritance can never remain in abeyance." (Oct., 1941.)

† Explain the principle of representation, and state how far and to what extent it is applicable in the case of succession to the estate of a deceased Hindu. (Oct., 1940.)

property of their father they take the property as joint tenants with rights of survivorship *inter se*. The property becomes ancestral in their hands in so far their own male descendants are concerned (A. I. R. 1942 All. 201, F.B.). But the principle of representation is applicable only to the case of sons, grandsons and great grandsons. It does not apply among brother's sons and brother's grandsons. A nephew (brother's son) is, therefore, entitled to succeed in preference to a grand-nephew (50 All. 904). But under the Mayukha, the sons of predeceased brothers take along with the surviving brothers (49 Bom. 292).

(7) * The general rule is that where two or more persons succeed together as heirs, they take the estate as tenants-in-common. In the following four cases, however, they succeed as joint tenants with the right of survivorship : (i) Two or more sons, grandsons or great grandsons inheriting jointly the separate property of their paternal ancestor. (ii) Two or more widows inheriting the estate of their husband. (iii) Two or more daughters inheriting the estate of their father, except in the case of Bombay, where they take absolute estates. (iv) Two or more grandsons by *a daughter*, who are *living as members of a joint family*, inheriting the estate of a maternal grandfather.

According to the Dayabhaga school, only two or more (i) widows or (ii) daughters take as joint tenants, and all other heirs as tenants-in-common.

(8) † The general mode of division among heirs of the same degree of relationship is *per capita*. Only in the following two cases, the division is *per stirpes*, viz., (i) partition between the sons, grandsons and great grandsons, and (ii) descendants in the second degree, such as sons' sons, daughters' sons and daughters' daughters, succeeding to *stridhana*.

(9) The whole blood is always preferable to half-blood. The heir of half-blood ranks immediately after the heir of whole blood, if both are otherwise in the same degree of propinquity to

* According to the Mitakshara school two or more persons inheriting jointly take as tenants-in-common. But there are four classes of heirs who take as joint tenants. Enumerate those co-heirs (April, 1941).

Write short note on : Succession *per stirpes* and *per capita*. (April, 1943.)

† Define and distinguish between *per stirpes* and *per capita*. (April, 1933.)

the deceased. It should be noted that under Hindu law, sons by the same mother but by different fathers (*i. e.*, uterine brothers), have no relationship for succession, as they belong to different families.

§ 90. Sapindaship. According to the Mitakshara, the right to inherit arises from *propinquity*, *i. e.*, proximity in blood. The test, under the Dayabhaga, is the *religious efficacy*, *i. e.*, the capacity to confer spiritual benefit upon the manes of the paternal and maternal ancestors. Both the schools start with the same text of Manu: "To the nearest *sapinda* the inheritance next belongs." The difference arises with regard to the meaning they attach to the word *sapinda*. The Mitakshara construes the sapinda relationship to arise from community of the particles of the same body, *i. e.*, the community of blood, a *sapinda* being a person connected by the same *pinda* or body. Hence, sapindaship can be established by connection through particles of one body; in other words, by blood relationship and descent from a common ancestor. On the other hand, the Dayabhaga views the sapinda relationship as arising from "community in the offering of funeral oblations," a *sapinda*, according to it, being a person connected with the same *pinda* or funeral cake.

Sapindas are of two kinds: (1) gotrajas,* *i. e.*, those belonging to the same gotra or family as the deceased, and (2) bhinna-gotras, *i. e.*, those belonging to a different gotra, or family, from the deceased. The bhinna-gotras are the cognates, that is, persons related to the deceased through a female, and are commonly known as Bandhus. The gotraja sapindas are the agnates, that is, person connected with the deceased by an unbroken line of male descent.

§ 91. Order of succession of heirs. The heirs of a deceased person are the following, who succeed one after the other in the order given below: (1) Sapindas in the technical sense; (2) Samanodakas; (3) Bandhus; (4) Spiritual preceptor; (5) Pupil; (6) Fellow student; and (7) the Crown.

Sapindas. † As the first class of heirs, the term "sapindas" is used in a narrow or technical sense, and does not include all

* Explain clearly the term Gotraja Sapinda. (April, 1926.)

† Explain clearly what is meant by (1) Sapindas; (2) Bandhus; (3) Samanodakas; (4) Sakulyas; (5) Sagotras. (Oct., 1941; April, 1944.)

persons who are connected by the tie of sapindaship explained. It includes the gotraja sapindas and not the bhinna-gotrajas with a further limitation that the claimant should be related within seven degrees to the deceased. Remoter gotraja sapindas constitute the second class of heirs namely, samanodakas. The class of sapindas includes also the wife and the mother and other paternal direct female ancestors, as the grand-mother and great grand-mother, within seven degrees. These females, though not

Table of Sapindas.

(44)M ₆ = (45)F ₆ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(46)	(47)	(48)	(55)	(56)	(57)
(39)M ₅ = (40)F ₅ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(41)	(42)	(43)	(52)	(53)	(54)
(34)M ₄ = (35)F ₄ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(36)	(37)	(38)	(49)	(50)	(51)
(17)M ₃ = (18)F ₃ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(19)	(20)	(21)	(31)	(32)	(33)
(12)M ₂ = (13)F ₂ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(14)	(15)	(16)	(28)	(29)	(30)
(7)M ₁ = (8)F ₁ -	X ₁	X ₂	X ₃ ...	X ₄	X ₅	X ₆
	(9)	(10)	(11)	(25)	(26)	(27)
(4)W = Propositus.						
(5)D	S ₁					
(6)D's son.	S ₂					
	S ₃					
	S ₄	(22)				
	S ₅	(23)				
	S ₆	(24)				

gotraja sapindas, are deemed as sagotra (of the same gotra) sapindas, because of the theory of Hindu law that on a marriage, the wife acquires the gotra of her husband. The following are the sapindas of a person : (1) his 6 male descendants in

the male line or male descendants within 7 degrees, according to the Hindu mode of counting, which begins from and includes the person from whom the degree is counted, *i. e.*, his son, son's son, *etc.*, being S_1 to S_6 in the table of Sapindas given below, in all 6 ; (2) his 6 male ascendants in the male line, the wives of the first three, and according to the Bombay school, also of the next three, *i.e.*, the father's father's father's father, *etc.*, being F_1 to F_6 , and their wives, *i.e.*, the mother, father's mother, *etc.*, being M_1 to M_6 in all 12; (3) the 6 male descendants in the collateral line of each of 6 male ascendants, *i.e.*, X_1 to X_6 in the line of F_1 , being his brother, brother's son, *etc.*, X_1 to X_6 in the line of F_2 , being his paternal uncle, paternal uncle's son, *etc.*, and so on in the lines of F_3 , F_4 , F_5 , and F_6 , in all 36 ; and (4) his own wife, daughter, and daughter's son, *i.e.*, 3.

Thus, the total number of sapindas is $6 + 12 + 26 + 3 = 57$. This number represents the minimum number or *types* of Sapindas. The number may be more, if there are more than one relation of the same kind.

The order of succession given in the above Table of Sapindas is according to Dr. Rajkumar Sarvadhikari, which appears to have been generally approved by the Privy Council. There is no conflict between the law of the provinces governed by the Mitakshara in the order of succession of the first ten sapinda heirs, *i.e.*, up to the brother's son, and hence succession up to the brother's son is called by Vijñaneshwar, "the compact series of heirs."

* The compact series of heirs consists of heirs *specifically enumerated* ; the heirs other than those who come in the compact series come under the general class of sapinda heirs. The compact series ends with the brother's son and is exhaustive ; it does not include brother's grandson (*Appaji v. Mohanlal*, 32 Bom. L. R. 709, F.B. ; 58 Mad. 323). The difference arises after the brother's son. The texts from the Mitakshara are as follows : "If there be not even brother's son (*putra*), gotrajas share the estate. Gotrajas are the paternal grandmother, and sapindas and samanodakas. The grandmother must, therefore, of course succeed im-

* Explain what is meant by "the compact series of heirs." (April, 1936 ; Oct., 1941.)

Mention the compact series of heirs under the Mitakshara law, noting such changes that have been made in it by different legislative enactments. (Oct., 1940.)

mediately after the brother's son (*suta*). Here on the failure of the father's descendants (*santan*), the heirs are successively the paternal grandmother, the paternal grandfather, the uncle and their sons (*putra*). The words '*suta*' and '*putra*' in the above texts have given rise to conflict. According to Dr. Sarvadhikari the word '*putra*', used in conjunction with brother and uncle in the above verses, includes three degrees of descendants of the ancestor from whom they spring. The father's descendants would, therefore, include the brother, the brother's son and the brother's grandson, the descendants of the paternal grandfather would include the paternal uncle, the paternal uncle's son and the paternal uncle's grandson, and so on. Hence the lines of collaterals are interrupted, as will be seen in the Table, after the third descendant, namely X_3 , of the ancestor from whom they spring. Thus, on the failure of a daughter's son, the inheritance *ascends*, the first to take being the mother, then the father, and then the three descendants of the father, one after another, *viz.*, the brother, the brother's son and the brother's grandson. Then there is a break in this line, and the inheritance again ascends, the first to take being the paternal grandmother, then the paternal grandfather, and then his three descendants, *viz.*, the paternal uncle, the paternal uncle's son and the paternal uncle's grandson. Then there will be a break, and the inheritance will go in the line of the paternal great grandfather, and go up to his three descendants. But after this the inheritance *descends* to the three remote descendants of the *propositus*, *viz.*, his sons, S_4 , S_5 , S_6 . Then again, it would ascend and go to the three remote descendants of the father, namely, X_4 , X_5 , X_6 ; then to like descendants in the line of F_2 , and next to the line of F_1 . Then it goes to the 4th, 5th and 6th lines in the same manner as in the first three

According to the Madras view, as given in the Smṛiti Chandrika, the word "*putra*" is to be taken in the literal sense, and brother's *putra* would mean brother's son and uncle's *putra* would mean uncle's son. According to this view, then, there will be a break after the second descendant of the ancestor from whom they spring, say in the line of F_1 , after X_2 . But there is no *descent* after the line of F_1 for the remote descendants of the *propositus*, and of F_1 , F_2 and F_7 . The inheritance goes from the two descendants of F_1 to the like inheritance of F_4 , F_5 , F_6 , and

after exhausting all the lines, it descends for the remote descendants.

But in *Buddha Singh v. Laltu Singh* (42 I. A. 208), their Lordships of the Privy Council disapproved the Madras view, and held that the words *putra* and *suta*, used in Mitakshara, included descendants at any rate to the third degree. "The word *putra* and its synonym (*suta*) employed by Vijnaneshwara in connection with brothers and uncles must be understood in a *generic sense* as in the case of the deceased owner and that the descendants in each ascending line, up to the fixed limit, should be exhausted *at any rate to the third degree* before making the ascent to the line next in order of succession." Therefore, in Madras also, each line would be continued upto three degrees.

Mr. Harrington takes altogether a different view, and his order is adopted with some modifications by Messrs. West and Buhler, whose work on the Hindu law of inheritance is a great authority in the Bombay Presidency. According to Mr. Harrington, the word *putra* includes all the six degrees of descendants of the ancestor from whom they spring, and hence each line must be continued to the sixth descendant without interruption, before making an ascent to a higher line. After the daughter's son, the inheritance goes to the mother, father, brother, brother's sons and brother's grandsons, and the remoter descendants upto the sixth degree; and so on in other lines. In *Buddha Singh's* case, though the Privy Council did not decide either in favour of Dr. Sarvadhikari's view or Mr. Harrington's view, yet it would seem from the judgment that their Lordships were inclined to adopt Dr. Sarvadhikari's view in preference to Mr. Harrington's view. "Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu." The rule referred to is: "To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant) is the giver of these (oblations), the fifth has no connection with them" (Manu).

Buddha Singh v. Laltu Singh, (1915); 42 I. A. 208=37 All. 604.

* The question for determination was whether, according to the Benares school of the Mitakshara law by which the parties were governed, the

* State briefly the facts, grounds of decision, and points of law laid down by the Court in the case of *Buddha Singh v. Laltu Singh* (42 I. A. 208). (April, 1944).

grandson of the great grandfather or the great grandson of the grandfather was the preferential heir. The judicial committee of the Privy Council held that the latter, namely, the great grandson of the grandfather was the preferential heir as he belonged to one line nearer than the other. After an exhaustive review of the original texts, other authorities and decided cases, their Lordships observed that the word "putra," which, when used in relation to the last owner signifies and includes "son, grandson and great grandson", thus including three degrees in the direct line of descent, is not to be construed in a literal and restricted sense when used in connection with collateral relatives, such as brother, uncle or grand-uncle. "The word putra and its synonym (*suta*) employed by Vijnaneshwara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and the descendants in each ascending line, upto the fixed limit, should be exhausted at any rate to the *third* degree before making the assent to the line next in order of succession." Their Lordships, further, *held*, that under the Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the gotrajas, the text to be applied to discover the preferential heir is the capacity to offer oblations, and that on this test also the great grandson of the grandfather was the preferential heir.

§ 92. The Hindu Law of Inheritance (Amendment) Act, 1929. The order of sapindas given above has been modified by this Act by the inclusion of four new heirs, *viz.*, the son's daughter, daughter's daughter, sister and sister's son. They rank in the order in which they are given next after the father's father and before father's brother. A sister's son includes a son adopted in the sister's lifetime, but not one adopted after her death. As laid down by the Privy Council, the term "sister" in the Act includes a consanguine sister, and the term "sister's son" includes a consanguine sister's son (*vide infra*). It may be noted that the above four persons were not recognised as heirs in the Mitakshara law, except in Bombay and Madras. Madras school recognised the sister, son's daughter and daughter's daughter, but placed them along with the Bandhus. In Bombay, the sister was recognised as gotraja sapinda, while the other three were regarded as Bandhus. Hence in Bombay also, the positions of the son's daughter, daughter's daughter and sister's son have been very much improved.

The Act applies not only to persons who were already heirs under the Mitakshara law but also to the persons specified so as

to constitute them heirs even in those provinces where they were not heirs according to the prevailing view of the law of the Mitakshara before. The Act applies to Hindus, including Jains, and to all persons governed by the Mitakshara law, including those governed by the Mitakshara law as modified by the Mayukha (43 Bom. L. R. 114). In a recent decision, the Privy Council has held that the term "sister" in the Act includes a half-sister, *i.e.*, a sister by the same father even though the mother be different (*i.e.*, a consanguine sister); but the term cannot be construed to include a half sister who has not the same father, *i.e.*, to a uterine sister. Similarly, the term "sister's son" in the Act includes a half-sister's son. Therefore a half-sister's son is a preferential heir to the father's uncle's son. The Act should be "read as a part of the general Hindu law of inheritance. As the Act has amended and altered the old order of succession in Hindu law and as it affects all Hindus governed by the Mitakshara, in the absence of an interpretation clause in the Act, the Courts should interpret its terms in the sense in which they are used in the Mitakshara law" (*Sahodra v. Ram Babu*, 1943, 45 Bom. L. R. 350). This ruling overrules the rulings of Allahabad, Madras, Patna and Lucknow, which laid down that a half-sister and a half-sister's son were not covered by the Act (55 All. 725, F.B.; A. I. R. 1938 Mad. 364; A. I. R. 1940 Pat. 310; 11 Luck. 148), and approves the Nagpur rulings (I. L. R. 1938 Nag. 115, F.B.; A. I. R. 1938 Nag. 97). The distinction of whole blood and half blood in persons of the same class under the Mitakshara law would hold good, and so a full sister or a full sister's son would be a preferential heir to a half sister or a half-sister's son respectively even under the Act.

As regards the Bombay Province, where the sister takes immediately after father's mother and before father's father (*vide* § 95, *infra*), if the Act is literally interpreted the effect is to place the sister in a lower position than that which she occupied in the Province before the passing of the Act. It has been held that the place so assigned to her is not affected by the Act, as the Act contemplates change in the order of succession only after father's father leaving the order of succession before father's father undisturbed (*Shidrapa v. Neelavabai*, 35 Bom. L. R. 397; 45 Bom. L. R. 434). Hence in Bombay the sister takes her place as under

the law before the passing of the Act, and not as under the Act after father's father and before father's brother.

Sec. 3 of the Act provides that (a) the Act does not affect any special family or local custom having the force of law, (b) it does not vest in the son's daughter, daughter's daughter or sister an estate larger than or different in kind from, that possessed by, a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, and (c) it does not enable more than one person to succeed by inheritance, if the estate is by custom or otherwise descendible to a single heir only. Thus clause (b) saves the absolute estate taken in Bombay by the son's daughter, daughter's daughter and sister, in the inheritance.

Act not retrospective. The Act is not retrospective. But an interesting point arises when a Hindu male died before the date when the Act came into force (i.e., before the 21st February 1929), leaving a widow, who succeeded to the usual widow's estate in her husband's property and who was living on the date when the Act came into force, but who subsequently dies. It has been held that the Act applies in such a case (40 Bom. L. R. 120 ; A. I. R. 1933 All. 152 ; A. I. R. 1934 Pat. 324 ; 17 Lah. 356 : A. I. R. 1937 Mad. 699, F. B., overruling 57 Mad. 718). As explained in 17 Lah. 356, looking to the nature of the estate inherited by a widow, the determination of the next heir of the deceased husband takes place on the death of the widow, and it would, therefore, be clear that the law in force at the time of this determination should govern the selection of the heir.

§ 93. **The Hindu Women's Rights to Property Act, 1937 (amended by Act XI of 1938).** The changes introduced by this Act in the Mitakshara law of coparcenary are dealt with in § 59A above. This Act has introduced revolutionary changes also in the Hindu law of succession and inheritance. The relevant provisions are :—

Section 2. "Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate."

Section 3. "When a Hindu governed by the Dayabhaga School of Hindu law dies leaving any property, and when a Hindu governed by any other school of law or by customary law dies intestate leaving separate property, *his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son :*

Provided that a widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or a son's son of such predeceased son ;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son."

Sub-section (3). "Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

The portion in italics in section 3, sub-section (1), was introduced by the Amending Act XI of 1938. Before this amendment, it ran as follows, "that separate property shall, subject to the provisions of sub-section (3), devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son." The use of the expression "lineal descendants" was likely to create confusion, as it includes both male and female descendants, and contrary to the intention of the Legislature, the provision was likely to be interpreted as giving equal rights of inheritance to daughters along with the widow.

Effect of the Act. (1) Under the law prior to the passing of the Act, as shown later on, the first class of heirs under the Mitakshara law included the son, the son's son and the son's son's son, who took simultaneously and as joint tenants. The widow of the deceased came in after them, so that she was totally excluded by these male descendants or any one of them, if all of them did not exist. The widow of a predeceased son and the widow of a predeceased son of a predeceased son were not recognised as heirs at all except in the Bombay School, and in the Bombay School they came in much later as shown in § 96. Under the Act these three classes of widows, namely, (1) of the propositus himself, (2) of his predeceased son and (3) of the predeceased grandson, provided the father of that grandson had predeceased the propositus, are promoted to the first class of heirs and they would share the inheritance simultaneous with the son, the grandson and the great grandson. Each of these widows is given the rank of a son. But in the case of the widow of a predeceased son and the widow of a predeceased grandson, the son

being also predeceased, their ranks as a son is contingent on their deceased husbands having left no son or grandson. If the husband has left a son or a grandson, these two classes of widows rank as a son's son, instead of a son. Further as each of these three classes of widows rank as a son, they or such of them as exist will jointly and equally take the estate if the deceased has left no male descendant of the class upto great grand-sons.

Illustrations : (1) If a Hindu has died leaving two widows, a son A, and two grandsons B and C by a pre-deceased son D, all of them would inherit jointly, and on a partition each of the two widows and A would be entitled to one-fourth share, and B and C would equally take their father's one fourth share, that is, each of them would get a one-eighth share. (2) If A had predeceased, leaving his widow SW, SW would take the one-fourth share instead of A, and the shares of others would not be affected. (3) If the widow of D is living in the illustration given above, she would rank as a son's son. The shares of the widows of the propositus and of A or his widow would not be affected, but D's widow as a son's son would share equally with B and C, the one-fourth share of her husband's branch, that is, each of the three would be taking one-twelfth. (4) If A has left his widow SW and also a son E or a grandson F. SW would share equally with E or F the one-fourth share. (5) If instead of a son or grandson, there is the widow of E, the widow of E and SW would equally share the one-fourth share. (6) If instead of any of the above-mentioned male descendants, there be the widows of the deceased himself, the widow SW of A, and the widow of the grandson E, the four would inherit simultaneously, and each would take a one-fourth share. (7) If only the son's widow SW or the grandson E's widow existed, she would take the whole estate to the exclusion of the other heirs.

(2) Unlike the provisions in section 3, sub-section (2) of the Act, which relates to the coparcenary interest of the deceased, the provisions relating to the law of succession and inheritance apply to all Hindus whether governed by the Mitakshara School or the Dayabhaga School, or by purely customary law on the subject. Further whereas the improved rights in the coparcenary interest are given only to the widow of the deceased, these provisions give new rights to the widows of pre-deceased sons and of grandsons, the sons being dead. The rights which these widows, however, get in the estate are of the nature of a woman's estate (*vide* Chap. XIII) and not absolute.

(3) The Act abrogates the rule of Hindu law, that subsist-

ing unchastity in a widow is a ground disqualifying her from inheriting her husband's estate [*vide* § 110(1)].

(4) The Act came into force on 14th April 1937. It is not retrospective (*vide*, section 4 of the Act). It does not apply to the estate of any Hindu dying before the commencement of the Act.

(5) The Act further specifically exempts from its operation the succession (1) to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir, *i.e.*, an impartible estate, or (2) to any property to which the Indian Succession Act, 1925, applies. Hence if a Hindu marries under the Special Marriage Act, on his death the question of inheritance to his estate would be governed by the Indian Succession Act, 1925, and not by the provisions of this Act.

(6) Further, as shown in § 59A, this Act applies only to properties other than agricultural land. Hence the law of succession to agricultural land is the same as under the law prior to the passing of this Act.

The Hindu Women's Rights to Property Act applies only to properties situate within British India. Succession to the immovable properties left by the deceased outside British India will be determined by the *Rex loci rei sitae*, *i.e.*, by the law of the land where the property is situate. The Act was never intended to apply to any kind of property situate outside British India. A widow is therefore not entitled even to moveables of her deceased husband held abroad (A. I. R. 1944 Mad. 340.)

§ 94. Samanodakas. These are the gotraja sapindas of the deceased from the 8th to the 14th degree in ascent and descent. It has been recently held by the Privy Council that according to the Mitakshara school of Hindu law, Samanodakas include only those agnates whose relationship to the deceased extends from the 8th to the 14th degree from the common ancestor and not beyond the 14th, and in the absence of any such agnate the estate devolves upon the Bandhus. Hence, as between an agnate descended in the male line from a common ancestor with the deceased in the 22nd degree and the father's sister's son (a Bandhu) of the deceased, the latter is a preferential heir (*Atmaram v. Bajirao*, 37 Bom. L. R. 553, P. C.). In an early case, where the parties were governed by the Mayukha, the Bombay High Court has held that the Samanodakas include all agnates from 7th degree onwards

without any limit of degree (*Bai Deokore v. Amritram*, 10 Bom. 372). The Samanodakas within fourteen degrees are 147 in number as shown below :

S_7 to S_{13} —descendants of the *propositus*.....7

F_7 to F_{13} —ascendants of the *propositus*.....7

X_7 to X_{13} —of each of his F_1 to F_6 $6 \times 7 = 42$

X_1 to X_{13} —of each of his F_7 to F_{13} ... $13 \times 7 = 91$

—
147

The order of succession among the samanodakas is determined by the rule that the nearer line of the samanodakas excludes the line more remote, and the nearer kinsman in one line excludes the remoter one in the same line.

§ 95. **Female Sapindas.** It will be seen from the table of Sapindas that, before the Amendment Act of 1929, the only female sapindas recognised were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother. These were the only female heirs recognised by the Bengal, Benares and Mithila schools. The Madras school recognises the following seven females also as heirs but classed them as Bandhus : (1) Sister, (2) Half-sister, (3) Son's daughter, (4) Daughter's daughter, (5) Brother's daughter, (6) Sister's daughter, (7) Father's sister.

* The Bombay school recognises the following females in addition to the five recognised by the Bengal, Benares and Mithila schools :—

(1) **Sister.** †The sister, whether of the whole or half-blood, is recognised as gotraja sapinda in the Bombay Presidency. The Mayukha places the sister immediately after the grandmother. The Mayukha admits that the married sister loses the gotra of her father, yet she is a *gotraja sapinda* of her brother,

* Elucidate the following : "The distinctive feature of the law which prevails in Western India is the laxity with which it admits females to succession." (April, 1929 ; Oct., 1927.)

What females inherit as Gotraja Sapinda and as Bandhus in the Bombay Presidency? (April, 1933.)

Name the females who can succeed as heirs to a male in the Bombay Presidency? (April, 1942.)

† Explain the grounds on which the Mayukha looks upon the sister as a gotraja and examine the validity of those grounds. (April, 1926.)

being born in the same gotra as her brother. The Mayukha takes the text of Manu, "To the nearest sapinda, the inheritance next belongs," and expands it by adding, "To the nearest sapinda, *male or female*, the inheritance next belongs." The Mitakshara does not expressly mention the sister as an heir, but some of its commentators say that in the term "brothers," whom the Mitakshara does name, sisters are included. And, again, the rule in Bombay being to invoke the aid of the Mayukha when the Mitakshara is silent or obscure, sisters are recognised as heirs in those parts of the Presidency also where the Mitakshara is the paramount authority. According to the decisions of the Bombay High Court, however, it is not on these or other texts but *on the ground of usage* that the right of a sister is based (24 Bom. 563 ; 28 Bom. 82).

There is, however, a difference between them in the places to be given to the sister and half-sister. Both under the Mayukha and the Mitakshara, as interpreted in Bombay, a sister does not take before a full brother's son ; but under the Mayukha she takes before a half-brother, though not in cases governed by the Mitakshara. Again in cases governed by the Mayukha she takes before a half-brother's son, but not under the Mitakshara.

It may be noted that after the passing of the Hindu Law of Inheritance (Amendment) Act, the sister has got a statutory right to inherit in all the Mitakshara schools, and her position will be governed by that Act. But the place assigned to the sister according to the Bombay school of Hindu law is not affected by the Hindu Law of Inheritance (Amendment) Act, 1929, as that Act contemplates change in the order of succession only after father's father leaving the order of succession before father's father undisturbed. The sister, therefore, is a preferential heir in a contest between herself and the brother's widow (*Shidramappa v. Neelavabai*, 35 Bom. L. R. 397).

There was some doubt as regards the effect of the Hindu Law of Inheritance (Amendment) Act II of 1929 on the position of the sister. The view of Sir Dinshah Mulla as expressed in his Hindu Law, 8th Edn. p. 42, is that the place of the sister in the order of succession is not affected by the Act, for the Act contemplates succession after the father's father, while the sister's place as determined by a series of decisions since 1865 is immediately after the father's mother. "In cases

governed by the Mitakshara, this appears to be only way of supporting the old order of succession. *It cannot be saved on the ground of custom*, for otherwise a sister in the Madras Presidency should still rank as a bandhu on the ground of custom, she having been recognised as such in that Presidency for upwards of half a century. This difficulty cannot arise in places where the Mayukha is the overruling authority, such as Gujarat, the island of Bombay and North Konkan, for the Act applies only to cases 'subject to the law of the Mitakshara' (Mulla). The present writer maintained in the first two editions of this Handbook that even in the Bombay Presidency, after the passing of the Amendment Act, sister must take her place as under the Act. He would have stuck to that opinion but there has been a recent decision of a Division Bench of the Bombay High Court (consisting of Baker, J., and Rangnekar, J.) which has arrived at the same conclusion as Sir Dinshah Mulla (*Shidrapa's case*). Baker J., after citing Sir Dinshah Mulla's view as given above, observes that in view of the fact that the Act, if literally interpreted, while designed to improve the position of the sister, has actually the contrary effect in Bombay, he would adopt the view that the Act was not intended to affect the position of the sister in Bombay (p. 339). Rangnekar, J., observes, "In my opinion the Act contemplates the succession after the father's father and leaves the law as to the order of succession before father's father undisturbed. Where, therefore, as in Bombay since 1867 sister is assigned a special place and takes before father's father, can it be contended that the legislature intended to degrade her, to take away from her superior and vested rights she had and to allow other heirs to supersede her?" To hold that the order of succession before father's father has been altered, I would expect quite different language than is found in the Act.... If necessary, I would be prepared to hold that a sister in Bombay is assigned a fixed place on the ground of a local custom having the force of law.... I do not, therefore, think that the place assigned to the sister in this presidency was intended to be altered by the Act, and that in any case her position is saved by reason of the proviso (as regards saving of local custom having the force of law)."

(2) **Half-sister** is an heir in the Bombay Presidency, and she inherits in cases governed by the Mitakshara immediately after the full sister, and in cases governed by the Mayukha after the half-brother.

Two or more sisters inheriting together take in Bombay equal shares absolutely, and not limited estates as joint-tenants with the right of survivorship. An unendowed (*i.e.*, a poor) sister has no priority over the endowed, such as the unendowed daughter has over the endowed daughter (*vide infra*).

(3) **Father's sister.** According to the Mayukha, the

father's sister is a *gotraja sapinda* and comes in after all the other *gotraja sapindas*, but before the *bandhus*. It is not settled whether under the *Mitakshara* as interpreted in Bombay, she is a *gotraja sapinda* or a *bandhu*. In a contest between a father's paternal uncle's son, who is a *gotraja sapinda*, and a father's sister, the former was preferred, as even under the *Mayukha*, she came in only after all the other *gotraja sapindas* were exhausted (*Ganesh v. Waghu*, 27 Bom. 910). In a contest between a mother's brother, a *bandhu*, and a father's *half-sister*, the father's *half-sister* was preferred, because even if she be regarded as a *bandhu*, being connected through the father (a *Bandhu ex parte paterna*), she was entitled to succeed before a *bandhu* connected through the mother (a *Bandhu ex parte materna*) (*Saguna v. Sadashiv*, 26 Bom. 716). The widow of a paternal uncle is entitled to succeed in preference to the father's sister (37 Bom. L. R. 150).

(4) **Widows of *gotraja sapindas*.** The great peculiarity of the Bombay school is that the widows of all the *gotraja sapindas* are recognised as heirs on the ground of *custom* (*Lallubhai v. Cassibai*, 5 Bom. 110). * According to the *Mitakshara* and the *Mayukha*, husband and wife are *sapindas* of each other. A widow of a *gotraja sapinda* has entered the *gotra* of her husband by marriage, and hence is called a *sagotra sapinda*, *i.e.*, one belonging to the same *gotra*, as distinguished from a *gotraja sapinda*, *i.e.*, one born in the same *gotra*. But it must be remembered that only the widows of *gotraja sapindas*, that is, of the *sapindas* in the technical sense, and of the *samanodakas*, can inherit in Bombay, and not the widows of *Bhinna-gotra sapindas* or *Bandhus* (*Vallabhdas v. Sakarbai*, 25 Bom. 281). The son, father, brother, brother's son, paternal uncle, paternal uncle's son, are all *gotraja sapindas*. The son's widow, the father's widow, if a *step-mother* (mother is a *sapinda*), the brother's widow, the brother's son's widow, the paternal uncle's widow and the paternal uncle's son's widow are all the respective *sagotra sapindas* who can inherit in Bombay.

* On what grounds are widows of *gotraja sapindas* brought in as heirs? State the rules whereby, in cases of competition between the widows of several *gotraja sapindas* or between the widow of a *gotraja sapinda* and a male *gotraja sapinda*, priority is determined. (April, 1927.)

Rules of succession of widows of gotraja sapindas :

(i) The widows of sapindas and samanodakas succeed before the Bandhus.

(ii) No widow of a gotraja sapinda can inherit until after the failure of members belonging to "the compact series of heirs." In *Appaji v. Mohanlal* (32 Bom. L. R. 709), the Full Bench of the Bombay High Court held that the compact series of heirs ends with the brother's son, and the brother's son's son is not in this series, but is a gotraja sapinda. Hence a brother's grandson must be postponed to a son's widow.

(iii) No widow of a gotraja sapinda can inherit before the sister or half-sister. This rule is not affected by the passing of the Hindu Law of Inheritance (Amendment) Act (*vide supra*).

(iv) Subject to the above rules, the widow of a gotraja sapinda stands in the same place as her husband, if living, would have occupied, provided there is no existing male sapinda within the six degrees of the line to which the husband belonged.

(v) Where the contest is between a widow of a gotraja sapinda representing a nearer line and a male gotraja sapinda representing a remoter line of gotraja sapindas, the widow inherits in preference to the male gotraja sapinda. Thus a son's widow is a preferential heir as between herself and a brother's son's son.

(vi) Where the contest is between a widow of a gotraja sapinda representing a nearer line and another widow of a gotraja sapinda representing a remoter line, the former widow inherits in preference to the latter. Where the contest is between widows of the same line of sapindas, the widow of a nearer sapinda would exclude the widow of a remoter sapinda of the same line.

(vii) The widows of gotraja sapindas succeeding as heirs take their interest *per capita* and not *per stirpes* (*Kallava v. Vithabai*, 32 Bom. L. R. 995).

As these widow-heirs have entered the gotra of the deceased by marriage, they take a limited estate in the property inherited by them as widows of gotraja sapindas. On remarriage, they lose their right to inherit as widows of gotraja sapindas in their first husband's family.

(5) Besides the above females, the Bombay school recognises the daughters of descendants, of ascendants and of colla-

terals, within five degrees as *Bandhus*, and they succeed in the order of propinquity. Thus daughters of descendants, such as son's son's daughters, daughters of ascendants, such as maternal grand-father's daughters (*i.e.*, the mother's sisters), and daughters of collaterals, such as brother's daughters, are heritable *bandhus*. Son's daughters succeed along with the *sapindas* under the Inheritance (Amendment) Act.

The other peculiarity of the Bombay school is, that it gives certain female heirs larger rights over the property inherited by them than the other schools. For this purpose, it divides female heirs into two classes : (a) those who are born in the gotra of the person whose property is to be inherited, such as the daughter, sister, son's daughter, *etc.*, and

(b) those who have entered the gotra by marriage, such as the widow, mother and widows of gotraja *sapindas*.

The females belonging to the first class take absolute estates in the property inherited by them ; while the females belonging to the second class take only limited estates as in other schools (*vide* Chap. XII).

§ 96. Order of succession in Bombay Presidency. As we saw above, the Bombay school differs from the other *Mitakshara* sub-schools in recognising certain females as heirs who are not recognised in other schools. In the Bombay Presidency itself there is a difference between the order of succession in cases governed by the *Mitakshara* and that in cases governed by the *Mayukha*. The following is the order of succession of *sapindas* in the Bombay Presidency in cases governed by the *Mitakshara* :

(1-3) Son, son's son, whose father is dead, and son's son's son, whose father and grand-father are both dead. Divided sons will be excluded by the undivided sons.

(4) Widow.

After 14th April 1937, under the provisions of the Hindu Women's Rights to Property Act, in case of properties other than agricultural land, the widow of the propositus, and the widow of a pre-deceased son, and the widow of a pre-deceased grand-son, the son being dead, succeed along with the son, the son's son and the son's son's son mentioned above (*vide* §93).

(5) Daughter.

(6) Daughter's son.

- (7) Mother.
- (8) Father.
- (9) Brother.
- (10) Brother's son.
- (11) Father's mother.
- (12) Sister.
- (13) Great-great-grandson.
- (14) Great-great-great-grandson.
- (15) Great-great-great-great-grandson.
- (16) Son's widow.
- (17) Grandson's widow.
- (18) Great-grandson's widow.
- (19) Great-great-grandson's widow.
- (20) Great-great-great-grandson's widow.
- (21) Great-great-great-great grandson's widow.
- (22) Brother's son's son.
- (23) Brother's son's son's son.
- (24) Brother's son's son's son's son.
- (25) Brother's son's son's son's son's son.
- (26) Step-mother.
- (27) Brother's widow.
- (28) Brother's son's widow.
- (29) Brother's son's son's widow.
- (30) Brother's son's son's son's widow.
- (31) Brother's son's son's son's son's widow.
- (32) Brother's son's son's son's son's son's widow.
- (33) Father's father.
- (34) *Son's daughter.*
- (35) *Daughter's daughter.*
- (36) *Sister's son.*
- (37) Paternal uncle.
- (38) Paternal uncle's son.
- (39) Paternal uncle's grandson.
- (40) Paternal uncle's great-grandson.
- (41) Paternal uncle's great-great-grandson.
- (42) Paternal uncle's great-great-great-grandson.
- (43) Father's step-mother.
- (44) Paternal uncle's widow.
- (45) Paternal uncle's son's widow.

- (46) Paternal uncle's grandson's widow.
- (47) Paternal uncle's great-grandson's widow.
- (48) Paternal uncle's great-great-grandson's widow.
- (49) Paternal uncle's great-great-great-grandson's widow.
- (50) Father's father's mother
- (51) Father's father's father.
- (52) Father's paternal uncle.
- (53) Father's paternal uncle's son.
- (54) Father's paternal uncle's grandson.
- (55) Father's paternal uncle's great-grandson.
- (56) Father's paternal uncle's great-great-grandson.
- (57) Father's paternal uncle's great-great-great-grandson.
- (58) Father's father's step-mother.
- (59) Father's paternal uncle's widow.
- (60) Father's paternal uncle's son's widow.
- (61) Father's paternal uncle's grandson's widow.
- (62) Father's paternal uncle's great-grandson's widow.
- (63) Father's paternal uncle's great-great-grandson's widow.
- (64) Father's paternal uncle's great-great-great-grandson's widow.
- (65-72) The 4th maternal and the 4th paternal ancestor and the latter's 6 descendants, one after another.
- (73-79) The widows of gotraja sapindas, Nos. 66 to 72, one after another.
- (80-87) The 5th maternal and the 5th paternal ancestor and the latter's 6 descendants, one after another.
- (88-94) The widows of gotraja sapindas, Nos. 81 to 87, one after another.
- (95-102) The 6th maternal and the 6th paternal ancestor and the latter's 6 descendants, one after another.
- (103-109) The widows of gotraja sapindas, Nos. 96 to 102, one after another.

It will be noticed that each line is continued until the sixth in descent is reached (*vide* §91). Then after exhausting the males in each line, the widows of respective gotraja sapindas are given.

The order given above is according to the changes made by the Amendment Act, 1929, which applies to succession after the

passing of the Act, *i.e.*, after the 21st Feb., 1929. For cases before that date, the son's daughter, daughter's daughter and sister's son will have their old places as *Bandhus*.

The *Mayukha* prescribes the following order of succession * :

- (1-3) Son, son's son, whose father is dead, and son's son's son, whose father and grandfather are both dead.
- (4) Widow.
- (5) Daughter.
- (6) Daughter's son.
- (7) *Father*.
- (8) *Mother*.
- (9) Full brothers *along with sons of full brothers who are dead*.
- (10) Full brother's son.
- (11) Father's mother.
- (12) Full sister.
- (13) Father's father and *half-brother in equal shares*.
- (14) *Half-sister*.
- (15) *Father's father's brother, father's brother and half-brother's sons in equal shares*.

As regards remoter heirs, the *Mayukha* say : " In other cases, too, when propinquity is equal, and there is nothing specific to indicate preference, such as the given order (in any text) and the like, the same rule holds." But this principle, *viz.*, nearness of blood, does not clearly indicate the rule of continuation of this series. As to the joint inheritance, such as between the father's father and half-brother or the father's father's brother, father's brother and half-brother's son, it is wholly unknown to practice and has not been recognised in any reported case (*Sakharam v. Sitabai*, 3 Bom. 353). Hence the order of succession after No. 12 will probably be (13) half-brother, (14) half-sister, (15) half-brother's son, (16) father's father (Mulla). This is the order for cases arising before the 21st Feb., 1927. After that date after father's father, will come (17) son's daughter, (18) daughter's daughter, (19) sister's son. And then the order is the same as under the *Mitakshara* from the *Mitakshara* number (13), except-

* What is "the compact series of heirs" in cases of succession governed by the *Mayukha*. (April, 1942.)

ing the father's father and the three new heirs under the Amendment Act, who as shown above come earlier.

The main points of difference between the order of succession under the Mitakshara and that prescribed by the Mayukha are : (1) In cases governed by the Mitakshara, the mother is preferred to the father ; whilst in cases governed by the Mitakshara the father is preferred to the mother and inherits before her. (2) In cases governed by the Mitakshara, a brother succeeds before a brother's son, while in cases governed by the Mayukha a brother and a deceased brother's son inherit together. (3) In cases governed by the Mitakshara, a half-brother comes in after a full-brother, but before a full brother's son, grand-mother and full sister. In cases governed by the Mayukha, a half-brother succeeds after a full brother, full brother's son, grandmother and full sister. (4) In cases governed by the Mitakshara, a half-brother's son succeeds after a full brother's son but before a grandmother and full sister. In cases governed by the Mayukha, a half-brother's son succeeds after the half-brother who himself (as shown in 3 above) succeeds after the full sister. (5) As to the position of the sister and half-sister, see § 95(1) above. As seen above the compact series of heirs under the Mayukha differs from that under the Mitakshara.

§ 97. Rights of certain heirs. (1) **Whole blood before half-blood.** Among sapindas of the same degree of descent from the common ancestor, relations of the whole blood are preferred to relations of the half-blood. A full brother is entitled to succeed before a half-brother and a paternal uncle of the whole blood before a paternal uncle of the half-blood. But this preference of the whole blood to the half-blood is confined to sapindas of the same degree of descent from the common ancestor. Thus a paternal uncle of whole blood excludes a paternal uncle of half-blood, but he cannot exclude a half-brother of the deceased, as the latter is nearer in degree (*Guruddas v. Laldas*, 35 Bom. L. R. 595, P. C. ; *Jatindra Nath Roy v. Nagendra Nath Roy*, 33 Bom. L. R. 1411, P.C.).

According to Bombay rulings, this preference of the whole blood to the half-blood is limited in the Bombay Presidency to the specific cases of brothers and brother's sons, and is not a general rule applicable to all the sapindas as in other provinces. Thus, it was held that a paternal uncle of full blood would not exclude a paternal uncle of half blood, but the two would succeed together in equal shares (*Vithalrao v. Ramrao*, 24 Bom. 317). But it would seem that the Bombay law is overruled by the two Privy Council rulings given above. In *Guruddas v. Laldas*, the appeal to the Privy Council was from the Judicial Commissioner's Court, C.P., in a case where the parties were governed by the Benares School. The Judicial Commissioner of C. P., following the Bombay

rulings, held that the preference of the whole blood to the half-blood is confined to brothers and brothers' sons, and does not extend beyond them to the members of the same class. The Privy Council reversing this decision held that *under the Mitakshara*, preference of the whole blood to half-blood is not so confined, but extends to all sapindas of the same degree of descent from the common ancestor. Hence, as between paternal uncles of the *propositus*, the whole blood excludes the half-blood.

(2) **Illegitimate sons.** * An illegitimate son is entitled to the right of inheritance only in the Sudra caste, and that, too, if he is a *dasiputra*. In other cases, he is entitled only to maintenance. Even when he is entitled to a share of inheritance, his rights are not the same as those of the legitimate son. He is entitled to a half share, which, according to the decision in *Kamulammal's case*, means *one-half of what he would have taken if he were legitimate*, and not of what the legitimate son *actually* takes. Thus between a legitimate son and an illegitimate son, the legitimate son takes $\frac{2}{3}$ th and the illegitimate son $\frac{1}{3}$ th, i.e., one-half of the share he would have taken, if legitimate. If there be no legitimate son but a widow, daughter or daughter's son, the illegitimate son takes $\frac{1}{2}$, because if he were legitimate, he would have taken the whole in this case, and the other half goes to the surviving widow, daughter or daughter's son, as the case may be. But if there be not even a widow, daughter or daughter's son, the illegitimate son takes *the whole* (*Sarasvati v. Mannu*, 2 All 134).

The illegitimate son can inherit only to his father; he has no right to inherit to his father's collaterals. Conversely, only the father can inherit his property in default of a nearer heir, and not the father's collaterals. An illegitimate son's right to inherit his father's property is not personal to him, but descends to his legitimate issue.

(3) **Widow.** A widow does not take an estate inherited by her as an absolute estate. She takes what is called a *widow's estate* (*vide* Ch. XIII). A widow, who is unchaste at the time when the inheritance opens, is disqualified from the inheritance [*vide* § 110(1)]. But if a widow, after the estate has vested in her, lapses into unchastity, the estate would not be divested. As

* State clearly the rights of an illegitimate son to succeed to his putative father. (Oct., 1926; April, 1942.)

Discuss the legal status of an illegitimate son under Hindu law. (April, 1929.)

a widow succeeds as the surviving half of her husband, she forfeits her right to her husband's estate on remarriage. A widow, however, does not lose on remarriage her right to succeed as *mother* to the estate of her son by the first husband. The Allahabad High Court differs from the other High Courts and holds that if a widow remarries after conversion to an alien religion, or under a custom of her caste, she does not forfeit her interest in her first husband's estate (*vide* § 16).

Where a person dies leaving only one widow, she *can alienate her life-interest* in the property inherited by her from her husband, but she cannot alienate the *corpus* of the property except for a legal necessity (*vide* Ch. XIII).

Where there are two or more widows, they take the property of their husband as joint tenants for their lives, with the rights of survivorship and equal beneficial enjoyment, and the right to partition (*Bhugwandeem v. Myna Bae*, 11 M. I. A. 487). The widows so succeeding are entitled to an equal share of the income, and on the death of one of them, the other or others take by survivorship the share of the deceased in the income. The co-widows are entitled to obtain a partition of the separate portions of the property so that each may *enjoy* her share of the income separately, because as their Lordships observed, "It is impossible to hold that a joint estate is not also partible" (*Sundar v. Parbati*, 16 I. A. 186). The estate is *partible* in the sense of being capable of separate enjoyment, but not in the sense of destroying the right of survivorship. A widow is not entitled *to enforce* an *absolute* partition against the others so as to destroy their right of survivorship. When a widow is excluded from the enjoyment of her share of the income, what she is entitled to is to get the separate *possession* of a portion of the estate, so that she can enjoy her equal share of the income accruing therefrom. There is nothing, however, to prevent a widow from voluntarily *releasing* her right of survivorship.

Each of the co-widows can deal as she pleases with her own life-interest, but she cannot alienate any part of the *corpus* of the estate by gift or will so as to prejudice the rights of the survivor or of a future reversioner. If they *act together* they can burden the estate with any debts contracted owing to legal necessity, but one of them, acting without the authority of the other, cannot

prejudice the right of survivorship by burdening or alienating any part of the estate. Alienation of any part of the estate, even for legal necessity or conferring spiritual benefit on the deceased husband, is not valid unless all the widows act together (A. I. R. 1942 All. 365). A surrender by one widow without the consent of the co-widow would be not valid beyond her lifetime so as to affect the right of survivorship of the co-widow (A. I. R. 1941 Pat. 29). The mere fact of a partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime (*Gauri v. Gaya Koer*, 31 Bom. L. R. 1).

For changes in widow's rights under the Hindu Women's Rights to Property Act, 1937, *vide* § 93.

(4) **Daughter.** As between daughters, the inheritance goes first, to unmarried daughters, then, to married daughters, who are unendowed or "unprovided for", and lastly, to married daughters who are rich. Hence an unmarried daughter succeeds in priority to a married daughter (35 Bom. L. R. 118). In Bombay Presidency, the daughters take absolute estates in severalty and not merely life-estates as joint tenants. In the other provinces, two or more daughters succeeding as heirs to the estate of their father take it as joint tenants for their lives with the right of survivorship, and their interest in the estate is limited as in the case of the widows. In these provinces, therefore, two or more daughters *collectively* are, in a legal sense, one heir to their father (*Aumir-tolall*, 2 I. A. 113); if they act together they can burden the reversion with any debt contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the right of survivorship by burdening or alienating the estate. The position of the daughters in this respect is the same as that of the widows (*Chattar Singh*, 58 All. 391). An illegitimate daughter, even of a Sudra, is not entitled to inherit to her father. Unchastity of a daughter is not a ground of exclusion from inheritance. A daughter may however be excluded by custom.

(5) **Daughter's son.** Under the old law, there was a custom by which a person appointed his daughter to raise up issue to him, and the son born of such a daughter was called *putrika*-

putra, as he became the son of the daughter's father and was a member of his family. Such a son was placed on an equal rank with the *aurasa* son. Although this practice of appointing a daughter to raise up issue has become obsolete, the daughter's son occupies a high place in the order of inheritance, and comes in before the parents of the deceased. It may be noted that a daughter's son is a *bhinna-gotra sapinda* or *bandhu*, being related to the deceased through a female, *viz.*, his mother.

§ 98. **Bandhus.** It is only on the failure of *Sapindas* and *Samanodakas*, that *Bandhus* are entitled to inherit. * *Bandhus* of a person are those of his blood relations who are connected through females and have passed into other families or *gotras* (*Vedachela v. Subramania*, 44 Mad. 753). They are the *bhinna-gotra sapindas*, that is, *sapindas* who belong to different families. They are the cognates or persons connected through a female or females. Every *bandhu* of a Hindu must be connected to him through at least one female. He may, however, be related to him through two females, or even more than two, where a female ancestor intervenes between him and the deceased.

† The *Mitakshara* divides the *Bandhus* into three classes, *viz.*, (1) *Atma-Bandhus* or one's own *bandhus*, (2) *Pitri-Bandhus* or the *bandhus* of the father, (3) *Matri-Bandhus* or the *bandhus* of the mother, and enumerates the father's sister's son, the mother's sister's son and the mother's brother's son as the *bandhus* in each class. Thus the above three relations of the owner himself are his *Atma-Bandhus*, *i. e.*, his father's sister's son, his mother's sister's son and his mother's brother's son. His *father's* father's sister's son, his *father's* mother's sister's son and his *father's* mother's brother's son are his *Pitri-Bandhus*. Similarly, his *mother's* father's sister's son, his *mother's* mother's sister's son and his *mother's* mother's brother's son are his *Matri-Bandhus*.

It was at one time thought that only the above nine relations expressly mentioned in the *Mitakshara* were *bandhus*. It is, however, now well established that the enumeration of *bandhus* in the

* Explain the term "Bandhu." How many classes of *bandhus* are enumerated in the ancient Sanskrit texts? Give illustrations of each class of *bandhus*. (Oct., 1925, 1927.)

† Comment briefly on the following: "The enumeration of *Bandhus* in the *Mitakshara* is illustrative and not exhaustive." (March, 1923.)

Mitakshara is *illustrative and not exhaustive*. For it would be unreasonable to hold that the mother's brother's son is a bandhu, and his father, that is, the mother's brother, is not a bandhu (*Girdhari Lal v. The Bengal Government*, 12 M. I. A. 448). And likewise, it will be unreasonable to hold that mother's brother is a bandhu and his father, that is, the maternal grandfather is not a bandhu. Thus the mother's brother, the maternal grandfather, and several others have been brought in as heirs (Mulla).

§ 99. Who are heritable bandhus. *It is not every bhinna-gotra sapinda or bandhu of the deceased who is entitled to succeed. The rules for determining heritability of a bandhu are that (1) he must be within five degrees of the deceased in ascent or descent, or of a common ancestor who is himself within five degrees of the deceased, and (2) there must be mutuality of sapindaship between him and the bandhu claimant.

(1) Under the first rule, heritable bandhus of a person would comprise his cognates within five degrees (1) from *himself*, in ascent or descent, or (ii) from any of his *paternal ancestors* within five degrees, *i. e.*, his father, father's father, father's father's father, and father's father's father's father, or (iii) from any of his *maternal ancestors* within five degrees, *i. e.*, his maternal grandfather, maternal great-grandfather, maternal great-great-grandfather, or (iv) from any one of his *father's maternal ancestors* within five degrees, that is, his father's mother's father, father's mother's father's father, father's mother's father's father's father, or (v) from any of his *mother's maternal ancestors* within five degrees, *i. e.*, his mother's mother's father, and mother's mother's father's father. The five degrees are to be counted from and inclusive of the person from whom the calculation is made. In counting the father's maternal ancestors, the father's mother is not to be counted as one degree, but in determining the degree of relationship of the cognate descendants of the father's maternal ancestor, the father's mother is to be included. This would mean that the cognate descendants of the father's mother's father's father's father would be excluded, because he would himself in that case be *sixth* in degree from the deceased, as the father's mother would count for a degree.

* Explain "heritable Bandhus". Discuss briefly the rules determining the order of succession among "Bandhus." (Oct., 1930.)

This rule is based on the general conclusion arrived at by the Privy Council in *Ramachandra v. Vinayak* (41 I. A. 290), that "the sapinda relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinnagotra sapinda with the fifth degree from the common ancestor." This decision was followed in the later Privy Council decision in *Adst Narayan Singh v. Mahabir Prasad*, (1921) 48 I. A. 86. These decisions are understood by the Bombay and Allahabad High Courts that the five degrees rule applies whether the bandhu claims through his mother or father (45 Bom. L. R. 95 ; 1938 A. L. J. 670). In a Madras case, this rule is stated to apply only when the claimant is claiming the inheritance through his mother, and that when he is claiming it through his father the sapinda relationship extends upto the seventh degree. Thus, father's father's son's son's daughter's daughter's son was held not to be a heritable Bandhu, because he was six degrees removed from the common ancestor, namely, the father's father, and because he was claiming through his mother (*Ramachandra's* case). But if the claimant were father's father's son's daughter's daughter's son's son, he would be a heritable bandhu according to the Madras view, for though he is six degrees removed, he is claiming through his father and hence within the heritable degrees of relationship (*Kesar Singh*, 1926, 49 Mad. 652 ; *vide* also A I R 1943 Mad 437, F.B.)

(2) * Under the second rule, the deceased and the bandhu who claims to inherit his estate must be sapindas of each other. "In order to entitle a man to succeed to the inheritance of another. he must be so related to the latter that they are sapindas of each other" (*Ramachandra v. Vinayak*, 41 I. A. 290). Of course this test of mutual *sapindaship* is a requisite to the title of heirship in all classes of heirs by blood relationship. As we saw above the title of blood relations to the inheritance of a deceased Hindu is based upon *sapindaship*. Now the etymological meaning of the term *sapinda* makes it evidently clear that the *sapinda* relationship is mutual. The term is made up of two parts, *sa* and *pinda*. *Sa* means equal (*samana*) and *pinda* means body (*dehah*) according to the Mitakshara and oblation according to the Dayabhaga. A *sapinda*, therefore, is one who has the same *pinda*. One cannot, therefore, be the *sapinda* of another unless that other is his *sapinda*. In other words *sapinda* relationship is mutual (*Gharpure*).

There is no difficulty as regards the application of his test to the heirs of the first two classes, namely, *sapindas* in the tech-

* Explain : In order to inherit as a Bandhu the Sapinda relationship between the claimant and the *propositus* must be mutual. (O.C. 1932.)

are not his heritable *bandhus*, because though the claimants were *sapindas* of the deceased, the deceased was not a *sapinda* of the claimants, being more than five degrees removed in a relationship to be traced through a female (*Ramchandra v. Vinayak*, 41 I. A. 290). Thus this test of mutual *sapindaship* is an important one in determining the heritability of *bandhus*. Dr. Rajkumar Sarvadhikari has formulated a practical test for the application of this test. According to him the right of inheritance accrues to a Bandhu, if the late owner and the person claiming the inheritance were related as *sapindas* to each other, either directly, or through themselves, or through their mothers or through their fathers. The bandhu, therefore, must be so related that the deceased was his maternal grandfather, or his father's maternal grandfather, or his mother's maternal grandfather, or the deceased was *in the line* of his own or his father's or mother's maternal grandfather. Thus, a daughter's daughter's son is a heritable bandhu, because the deceased is a maternal grandfather of his mother, but a daughter's son's son's son is not a heritable bandhu because the deceased is not a maternal grandfather of himself, or of his father, or his mother, but of his father's father.

Applying this test and restricting ourselves to five degrees from the deceased, we find that the following cognate descendants of the deceased are his heritable bandhus : (1) the *daughter's son*, because the deceased was *his* maternal grandfather ; a daughter's son, however, inherits with the gotraja *sapindas* ; (2) the *son's daughter's son*, because the deceased was *his* maternal grandfather's father ; (3) the *son's son's daughter's son*, because the deceased was *his* maternal grandfather's father's father ; (4) the *daughter's son's son*, because the deceased was *his father's* maternal grandfather ; (5) the *son's daughter's son's son*, because the deceased was *his father's* maternal grandfather's father ; (6) the *daughter's daughter's son*, because the deceased was *his mother's* maternal grandfather ; (7) the *son's daughter's daughter's son*, because the deceased was *his mother's* maternal grandfather's father. It may be noted that the first three are *daughter's sons* of the family, *viz.*, of the deceased, of his son and grandson ; the 4th and 5th are the *daughter's son's son* of the family, *viz.*, of the deceased and his son. The daughter's son's son of the grandson is not a heritable bandhu, because he is *sixth* in degree from the deceased. The last

two are *daughter's daughter's sons* of the family, *viz.*, of the deceased himself and his son. These seven descendants of each of the common ancestors from whom the degree of a heritable bandhu is to be counted, and the common ancestors themselves, such as the maternal grandfather, who are not in direct line of *male* ascent, together with the lineal descendants within five degrees (*viz.*, the son, son's son, son's son's son, son's son's son's son), of such ancestors, are all heritable bandhus. In the case of the *father's mother's father's father's father*, only himself and his four *lineal* descendants would be bandhus, and not the above seven cognate descendants, as in counting these, the father's mother would count for a degree.

§ 100. **Three classes of bandhus.** Bandhus are divided into (1) Atma bandhus or one's own bandhus, (2) Pitri bandhus or the father's bandhus, and (3) Matri bandhus or the mother's bandhus.

Atma bandhus are :

the <i>deceased's</i> own 6 cognate descendants	..	..	6
the <i>father's</i> 7 cognate descendants	..	..	7
the <i>father's father's</i> 7 cognate descendants	..	..	7
the <i>mother's father</i> , his 7 cognate descendants and 4 agnate descendants, <i>viz.</i> , (1) maternal uncle, (2) maternal uncle's son, (3) maternal uncle's grandson, (4) maternal uncle's great-grandson	.	..	12
			<hr/>
			32

N. B. The daughter's son of the deceased, though a bandhu, inherits with gotraja sapindas (*vide* § 97).

Pitri bandhus are :

the father's father's father's 7 cognate descendants	..	7
the father's father's father's father's 7 cognate descendants		7
the father's mother's father, his 7 cognate and 4 agnate descendants	.. .. .	12
the father's mother's father's father, his 7 cognate and 4 agnate descendants	. .. .	12
the father's mother's father's father's father, and his 4 agnate descendants	.. .. .	5
		<hr/>

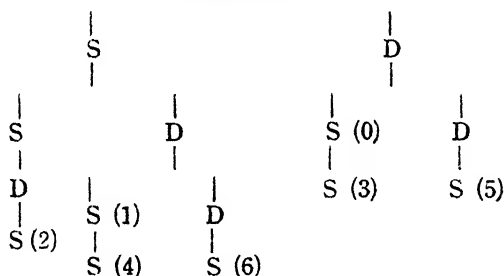
Matri bandhus are :

the mother's father's father, his 7 cognate and 4 agnate descendants	12
the mother's father's father's father, his 7 cognate and 4 agnate descendants	12
the mother's mother's father, his 7 cognate and 4 agnate descendants	12
the mother's mother's father's father, his 7 cognate and 4 agnate descendants	12

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Table of Bandhus.

F's M's FFF—59-63			
28-34-FFFF	F's M's FF-47-58	88-99-M's FFF	112-123-M's M's FF
21-27-FFF	F's M's F-35-46	76-87-M's FF	100-111-M's M's F
14-20-FF=	F's M	64-75-M's F	M's M
7-13-F			M

Propositus.**§ 101. Rules of the Bombay High Court for determining order of succession among bandhus. * (1) Atma**

* Briefly explain the principles underlying the scheme of succession of "Bandhus" to the separate property of a male dying without issue in the light of recent decisions. (Oct., 1928.)

State the rules for determining the order of succession among male bandhus noting the applicability or otherwise of the rule of religious efficacy. (Oct., 1940; April, 1943)

bandhus succeed before Pitri bandhus, and Pitri bandhus before Matri bandhus (*Muthusami*, 23 I. A. 83).

(2) In each class of bandhus, propinquity should be the governing factor, that is, in each class the nearest in blood to the deceased is entitled to succeed. Thus, between the mother's brother and the father's sister's son, both Atma bandhus, the former being nearer in degree is the preferential heir (*Virangauda v. Yellappa*, 1943, 45 Bom. L. R. 17, F. B., wherein the earlier contrary Full Bench decision in *Sakharam v. Balkrishna*, 1925, 49 Bom. 739, was treated as overruled by the Privy Council decision in *Balasubrahmanya v. Subbayya*, 1937, 65 I. A. 93).

(3) In the case of bandhus equally removed from the deceased, one in direct line of descent is to be preferred to one in the collateral line (*Dattatraya v. Gangabai*, 46 Bom. 541). In a competition between bandhus of the same class, where the degree is equal, the one claiming from nearer line is to be preferred to the other who is claiming from remoter line. Hence as between one's own sister's daughter's sons and one's paternal uncle's daughter's sons, the former are the preferential heirs (A. I. R. 1943 All. 87 & 177).

(4) When the test of propinquity or nearness of degree fails (and not until then), the test of spiritual benefit is a ground of preference, and the one possessing superior religious efficacy is to be preferred (*Jatindra Nath v. Nagendra Nath*, 58 I. A. 372).

(5) In each class, a bandhu of the whole blood is preferred to a bandhu of the half-blood, if they are of an equal degree of propinquity to the deceased.

(6) Prior to the decision of the Privy Council in *Vedachela v. Subramania* (48 I. A. 349), it was held by the Bombay High Court that bandhus *ex parte paterna* (i. e., related through the father) take before bandhus *ex parte materna* (i. e., related through the mother). In *Vedachela's* case, their Lordships held that the rule of priority as between bandhus *ex parte paterna* and those *ex parte materna* applied as between pitri bandhus and matri bandhus, and that there was no foundation in the texts or commentaries for applying it as between bandhus of the same class *inter se*. It, therefore, appears from the judgment of their Lordships that where the bandhu *ex parte materna* is nearer in degree than a bandhu *ex parte paterna* and oblations offered by the former

are more efficacious than those by the latter, the rule of preferring bandhus *ex parte paterna* over bandhus *ex parte materna* does not apply. In Vedachela's case, on the above grounds, the maternal uncle, though a bandhu *ex parte materna* was preferred to father's father's daughter's son's son, who is a bandu *ex parte paterna*. But in the later case of *Jotindra Nath v. Nagendra Nath*, their Lordships observed that the rule of preference of bandhus *ex parte paterna* was supported by a considerable volume of authority, which lays down the rule that as between bandhus of the *same class and equal in degree*, one related on the father's side is to be preferred to one related on the mother's side. The contest in the case was between the father's half-sister's son and the mother's sister's son. The father's half-sister's son was entitled to succeed in preference to the mother's sister's son, whether the rule of preference of bandhus *ex parte paterna* was applied or the test of spiritual efficacy was applied. Their Lordships, however, thought that *the safer test* was that of spiritual efficacy, and decided on that ground in favour of the father's half-sister's son (33 Bom. L. R. 1411).

(7) *As between bandhus both *ex parte paterna* and of the same degree, a male is to be preferred to a female (*Kenchava v. Girimalappa*, 51 I. A. 368). Thus the father's sister's son is to be preferred to the father's brother's daughter. Where, however, the contest is between a *female* bandhu *ex parte paterna* and a *male* bandhu *ex parte materna*, according to the Bombay view, the female is to be preferred to the male (*Saguna v. Sadashiv*, 26 Bom. 710). The Madras High Court takes the opposite view. Thus according to the Bombay High Court, the *father's* half-sister will be preferred, though a female, to the *mother's* brother, who is a bandhu *ex parte materna* (*Saguna's case*).

In *Balkrishna v. Ramkrishna* (45 Bom. 353), it was held that a male Bandhu is entitled to preference over a female Bandhu, even though the latter is nearer in degree. Hence the mother's sister's son is entitled to succeed in priority to the brother's daughter. "We are of opinion that female bandhus are excluded by the nine classes of

* State clearly the rules whereby precedence would be governed in cases when the competing bandhus are a male and a female, or one related to the deceased on his father's side and the other on his mother's side. (Oct., 1927.)

Comment on the following: "Under the Mitakshara all male Bandhus are to be preferred to female Bandhus, whatever their degree of propinquity."

bandhus mentioned in the Mitakshara." In *Renchava v. Kalingapa*, it was held that the females in each line of gotrajas are excluded by any males existing in that line, within the limits to which the gotraja relationship extends. "It was said, and no doubt correctly said, that the anomaly of a female relation excluding her own offspring occurs in 'the compact series of heirs'—where the mother succeeds as heir before the brothers and their sons and also among the female gotrajas in the ascending line, where the grandmother, great-grandmother, etc., are placed at the head of their respective lines. This, however, only applies to the case of lineal ascendants."

In *Rajeppa v. Gangappa* (47 Bom. 48), the Bombay High Court held that the * *mother's brother's son* and *mother's sister's son* shared the inheritance equally because they are of the same degree and belong to the same class. The test of spiritual efficacy is not to be applied in Bombay. "Speaking with reference to this Presidency, I think that the only test that has been applied, and that ought to be applied is propinquity to the deceased. In this Presidency, the test (of religious efficacy) has not been accepted as sound in the case of distant relations—like *bandhus*" (*per* Shah, J.). The authority of this decision seems to have been shaken in the following recent Privy Council decision.

In *Jotindra Nath v. Nagendra Nath* (58 I. A. 372 = 33 Bom. L. R. 1411), their Lordships of the Privy Council held that under the Benares school of the Mitakshara, the son of a half-sister of the father of the *propositus* is entitled to succeed in preference to the son of a sister of his mother, on the ground that the former confers a greater spiritual benefit upon the *propositus* which determines the measure of propinquity, "When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty" (13 M. I. A. 373). "It is, their Lordships think, a mistake to suppose that the doctrine of spiritual benefit does not enter into the scheme of inheritance propounded in the Mitakshara. No doubt propinquity in blood is the primary test, but the intimate connection between inheritance and funeral oblations is shown by various texts of Manu. and the Virmitrodaya brings in the conferring of spiritual benefit as the measure of propinquity where the degree of blood relationship furnishes no certain guide. The spiritual doctrine of *pinda* oblations is common to all classes of Hindus, whether governed by the Mitakshara or the Dayabhaga law" (33 Bom. L. R. 1411 at p. 1416). In a later case, the Privy Council observed that the rule explained in *Vedachela b. Subramania*, "that as between *bandhus* of the same class the spiritual benefit they confer upon the *propositus* is as stated in the Virmitrodaya a ground of preference" does not make spiritual benefit or religious efficacy the sole test of succession as between the *bandhus* of the same class, to the exclusion of that of nearness

* Who is a preferable heir in the following :
Mother's sister's son and mother's brother's son? (March, 1923.)

of degree. The effect of that rule is only to make the question of religious efficacy an admissible test. The principle laid down in *Jatindra Nath v. Nagendra Nath* that test of religious efficacy is only to be invoked when that of proximity of degree has failed is neither antagonistic to nor inconsistent with the decision in *Vedachela v. Subramania* (*Balasubramanya v. Subbaya*, 1938, 40 Bom. L. R. 704, P. C.).

§ 102. Order of succession. According to the rules laid down by the Bombay High Court, as given above, the following is the order of succession of Bandhus. It will be noticed that of the cognate descendants in each class, the first to take are the three daughter's sons of the family, *e.g.*, in the case of Atma bandhus, first the deceased's son's daughter's son (the daughter's son inheriting with gotraja sapindas), and his son's son's daughter's son ; then his father's daughter's son, his father's son's daughter's son, and his father's son's son's daughter's son ; next, his father's father's daughter's son, his father's father's son's daughter's son : and his father's father's son's son's daughter's son. In the case of the maternal grandfather's line, the first to take will be the maternal grandfather himself, then his lineal descendants within four degrees, that is, his son, son's son, son's son's son ; then will come the *daughter's sons* of his family, *viz.*, the maternal grandfather's *daughter's son*, maternal grandfather's son's *daughter's son* and maternal grandfather's son's son's *daughter's son*, and lastly, the *fifth lineal* descendant, *viz.*, the maternal grandfather's son's son's son. Then would come the *daughter's son's sons* of the families of the deceased and of the common ancestors in like order, and at the end the *daughter's daughter's sons* of the families. The same order would apply to Pitri bandhus and Matri bandhus.

The order of succession of Atma bandhus :

- (1) Son's daughter's son.
- (2) Son's son's daughter's son.
- (3) Father's son's daughter's son, *i. e.*, brother's daughter's son.
- (4) Father's son's son's daughter's son.
- (5) Father's father's daughter's son, *i.e.*, father's sister's son.
- (6) Father's father's son's daughter's son.
- (7) Father's father's son's son's daughter's son.

- (8) Mother's father.
- (9) Mother's father's son, *i. e.*, mother's brother or maternal uncle.
- (10) Mother's father's son's son, *i. e.*, maternal uncle's son.
- (11) Mother's father's son's son's son.
- (12) Mother's father's daughter's son, *i. e.*, mother's sister's son.
- (13) Mother's father's son's daughter's son.
- (14) Mother's father's son's son's daughter's son.
- (15) Mother's father's son's son's son's son.
- (16) Daughter's son's son.
- (17) Son's daughter's son's son.
- (18) Father's daughter's son's son, *i. e.*, sister's son's son
- (19) Father's son's daughter's son's son.
- (20) Father's father's daughter's son's son.
- (21) Father's father's son's daughter's son's son.
- (22) Mother's father's daughter's son's son.
- (23) Mother's father's daughter's son's son
- (24) Daughter's daughter's son.
- (25) Son's daughter's daughter's son.
- (26) Father's daughter's daughter's son
- (27) Father's son's daughter's daughter's son.
- (28) Father's father's daughter's daughter's son
- (29) Father's father's son's daughter's daughter's son.
- (30) Mother's father's daughter's daughter's son.
- (31) Mother's father's son's daughter's daughter's son.

N. B. Daughter's son would be before (1), but is omitted because he inherits along with the sapindas. *Father's daughter's son, i. e.*, sister's son would come before (3), but by the Amendment Act, he also inherits with the sapindas. But an *adopted* son of a sister, if the adoption is made after the sister's death, will have his place among the bandhus before (3).

The following will enable the student to understand the scheme of Bandhu succession :—

P.	F.	FF.	MF.
(0) DS.	(0) DS.	(5) DS.	(8) MF.
(1) SDS.	(3) SDS.	(6) SDS.	(9) S.
(2) SSDS.	(4) SSDS.	(7) SSDS.	(10) SS.
			(11) SSS.
			(12) DS.
			(13) SDS.
			(14) SSDS.
			(15) SSSS.
(16) DSS.	(18) DSS.	(20) DSS.	(22) DSS.
(17) SDSS.	(19) SDSS.	(21) SDSS.	(23) SDSS.
(24) DDS.	(26) DDS.	(28) DDS.	(30) DDS.
(25) SDDS.	(27) SDDS.	(29) SDDS.	(31) SDDS.

N. B.—P means Propositus, F father, FF father's father, MF mother's father, D daughter, S son. Propositus's DS is a sapinda as a special case. Father's DS now succeeds with sapindas under the Inheritance Amendment Act.

§ 103. **Female Bandhus.** Besides the above males, the daughters of descendants, of ascendants and of collaterals within five degrees are recognised as bandhus in Bombay. These female bandhus succeed in order of propinquity. The son's daughter and daughter's daughter, however, inherit now with the gotraja sapindas (For *father's sister*, see *supra*). Priority between a male bandhu and a female bandhu is governed by rule 7, § 101

§ 104. **Spiritual preceptor, pupil, fellow-student and the Crown.** On failure of the kindred, the inheritance goes one after the other to the spiritual preceptor, pupil, fellow-student and the Crown. In the case of a hermit or *Vanaprastha*, his spiritual brother of the same hermitage would succeed even in preference to the kindred; similarly in the case of an ascetic or *sanyasi*, a virtuous pupil, or *chela* (*vide* 42 Bom. L. R. 1, P. C.) and in the case of a student in theology or a Brahmachari, his religious preceptor succeeds before the kindred.

§ 105. **Succession among reunited members.** The texts prescribe an arbitrary order of succession among the reunited members, based neither on the principle of succession nor of survivorship. According to the Mayukha, the reunited member has in every case preference over the separated. In case, however, of

separated full brothers and reunited half-brothers, uncles, or the like, the Mayukha gives them equal shares.

The following is the Mitakshara order of succession to the share of a reunited member :

- (1) reunited son, grandson and great grandson ;
- (2) son, grandson and great grandson, not reunited ;
- (3) reunited whole brother ;
- (4) reunited half-brother and separated full brother ;
- (5) reunited mother ;
- (6) reunited father ;
- (7) any other reunited coparcener ;
- (8) half-brother not reunited ;
- (9) mother not reunited ;
- (10) father not reunited ;
- (11) widow ;
- (12) daughter ;
- (13) daughter's son.

Then other sapindas, samanodakas, and bandhus, as in the ordinary case.

Chapter X.

DAYABHAGA INHERITANCE TO MALES.

§ 106. **Nature.** The general principle under the Dayabhaga law in determining the right of heirship is the *principle of spiritual benefit*. "There is in the Hindu law so close a connection between their religion and their succession to property that the preferable right to perform the *śraddh* is commonly viewed as governing also the preferable right to succession of property." The right to inherit is based not on offering *pinda* (funeral oblation), but on *capacity to offer* it. The simple fact of being entitled to give *pinda*, the mere circumstance of being competent to

perform the obsequial rites constitutes a claim on inheritance (Sarvadhikari).

The basis of the spiritual benefit is the *Parvana Sraddh*, which is a ceremony in which three distinct kinds of oblations are made by a person to his deceased ancestors. These three kinds are (1) the *Pinda*, or the entire cake or undivided oblation, (2) the *Pinda-lepas* or remnants of the *pindas*, which are attached to the hand while mixing up the things of which the *pindas* are composed, and (3) mere libation of water. The *pinda* is offered to the three immediate paternal or maternal ancestors · the *pinda lepas* to the three paternal ancestors beyond these and their six male descendants, and to his own 4th, 5th and 6th descendants as well as of his three immediate paternal ancestors ; the libations of water are offered by a person to his paternal ancestors ranging seven degrees beyond those who receive *pinda-lepa*. He who offers a *pinda* and he to whom a *pinda* is offered are *sapindas* of each other. In the same way, he who offers *pinda-lepas* and he to whom they are offered are the *sakulyas* of each other. Persons connected by libations of water are called *samanodakas*.

§ 107. **Three classes of heirs.** The three kinds of offerings give rise to the three classes of heirs, who succeed one after the other, *viz.*, (1) *Sapindas*, (2) *Sakulyas*, and (3) *Samanodakas*. The *sapindaship* arises, under the *Dayabhaga*, not merely between persons directly connected by the *pinda*, but also between persons connected by the offering to a common ancestor, because a person benefits also by offerings to the *paternal* ancestors to whom he himself is bound to offer them. The result is that persons connected by oblations to common ancestors become *sapindas*, *sakulyas* and *samanodakas* of one another, according to the nature of the oblation presented to them. Again although the deceased has no right of participation in the oblations presented to his maternal ancestors, still inasmuch as the three immediate maternal ancestors received oblations from him, and the agnate and cognate descendants of each offered *pindas* which the deceased was bound to give, there is created a heritable bond between him and his maternal kinsmen (Sarvadhikari). Thus, the maternal uncle's son of the deceased offers *pindas* to the maternal grandfather and maternal great-grandfather of the

deceased, these being the *paternal* ancestors of the maternal uncle's son. As the deceased himself was bound to offer pindas to those ancestors, the maternal uncle's son is a sapinda with him. Under the Mitakshara law he is a bandhu. Thus the Dayabhaga sapindas would include persons who are bandhus under the Mitakshara law. The Hindu Women's Rights to Property Act, 1937, applies to Hindus governed by the Dayabhaga School also (*vide* § 93).

§ 108. Points of difference between the Mitakshara and the Dayabhaga law of inheritance. (1) * Under the Mitakshara law, *blood relationship* determines the *right* of a person to inherit the property of a deceased person, while *propinquity* or nearness of blood relationship determines the *priority* among the heirs. Under the Dayabhaga, the *right* depends upon *capacity to confer religious benefit* on the deceased, and *priority* among the heirs is determined by the *amount of spiritual benefit* conferred on the deceased by them. But these two principles, viz., of blood relationship or consanguinity of the Mitakshara and of spiritual benefit of the Dayabhaga, are parallel doctrines and are not excluded by each other. The religious rites can never be performed by any other than the nearest of kindred ; and, in a similar manner, the inheritance can never devolve on any other than the nearest of kin. The two propositions being thus co-extensive in the majority of cases, the result is that the same persons who are heirs under the Dayabhaga law are also heirs under the Mitakshara law. However all persons who are heirs under the Mitakshara law are not heirs under the Dayabhaga law. The Dayabhaga excludes many cognates recognised as heirs by the Mitakshara.

Again, it would seem that the difference in the principles between the two schools is being bridged by judicial decisions, and one common principle is being established that, according to both the schools, propinquity or proximity by birth is the principle underlying the order of succession, but the capacity of conferring spiritual benefit determines the measure of propinquity and is, therefore, a ground of preference. Thus the two principles

* State and distinguish the principle guiding the rules of inheritance under the Mitakshara from that under the Dayabhaga. (April, 1932.)

are made to supplement each other. One only of them, without any reference to the other, would not be sufficient. Thus even according to the Dayabhaga school, under which the right of inheritance is mainly based on the doctrine of spiritual benefit, this doctrine cannot be applied consistently in all cases, *e.g.*, in cases of females succeeding to males, in the case of a *chela* succeeding to his *guru*, or in the case of samanodakas (35 Cal. 721). Similarly, the Mitakshara doctrine of blood relationship by itself would not always yield satisfactory results. Suppose there are three claimants to the property of the deceased : the deceased's brother's grandson, his paternal uncle's son and his father's paternal uncle. Each of these claimants is four degrees removed from the deceased owner in the sense that three persons intervene between the deceased owner and each of them. Each of them may well say that the blood corpuscles in his veins are equal in every respect to those of another claimant. The legitimate consequence of the application of the doctrine of propinquity would be that the property will have to be divided equally among these three claimants, and this is what the author of Mayukha has done, but their Lordships of the Privy Council observed in a recent Mitakshara case : " It is, their Lordships think, a mistake to suppose that the doctrine of spiritual benefit does not enter into the scheme of inheritance propounded by the Mitakshara " (*Jatindra Nath's case*). Thus under the Mitakshara law, the right to inherit is founded on consanguinity or blood relationship, and propinquity or proximity in blood is the primary test and the test of spiritual efficacy is a ground of preference. As regards the Dayabhaga law, it has been held in recent case by the Calcutta High Court (*Nalinakshar v. Rajanikanta*, 58 Cal. 1392) that the doctrine of spiritual benefit or offering of funeral cakes is not the only test of heirship. Propinquity is the principle underlying the order of succession, but the capacity for conferring spiritual benefit is also taken into consideration along with it. The question of capacity to offer funeral cakes becomes important when it has to be considered in connection with the claims of rival competitors to heirship and in determining the order of succession ; in other words, *it is a key to the order of succession, but not to inheritance*. It is only on the failure of nearest heirs that the question of spiritual benefit really arises.

(2) Under the Mitakshara the kindred, who inherit, are divided into *sapindas*, *samanodakas* and *bandhus*; under the Dayabhaga they are divided into *sapindas*, *sakulyas* and *samanodukas*. The *sapindas* under the Mitakshara are those who are connected by particles of the same body. *Sapindas* under the Dayabhaga are those connected by funeral oblations. *Sapinda*-ship extends under the Mitakshara to seven degrees, while under the Dayabhaga it extends only to four degrees. Under the Mitakshara, there is no such class as *sakulyas*, while, with the exceptions of a daughter's son, daughter's daughter and sister's son, *bandhus* or persons connected through a female succeeds only after all the *samanodakas* are exhausted. Under the Dayabhaga, several persons connected through females come under the class of *sapindas* on account of the doctrine of spiritual benefit. The *samanodakas* under both the systems are the same and they are the *agnatic* relations from the 6th to the 14th degree.

(3) Under the Mitakshara, no *bandhu*, except in the cases mentioned above can inherit so long as there is a *sapinda* or a *samanodaka* alive who is capable of taking. Under the Dayabhaga, the *bandhus* come among the *sapindas* and succeed before the *sakulyas* and the *samanodakas*. The *bandhus* under the Dayabhaga are smaller in number than under the Mitakshara, because of its doctrine of spiritual benefit, which excludes a large number of blood relations who cannot satisfy this test.

Chapter XI.

EXCLUSION FROM INHERITANCE AND PARTITION.

§ 109. **Nature.** The ancient Hindu mind, being wholly engrossed in the performance of *yajnas* or sacrifices, thought all property was intended for that purpose only. Necessarily, therefore, those persons who were incapable of performing the sacrifices, owing to any physical or mental defect, were thought incapable of possessing property, and were excluded from inheritance or a share on partition. This rule of pure Hindu law has been considerably modified by the Hindu Inheritance (Removal of Disabilities) Act, 1928. Besides the physically or mentally defectives,

persons are excluded by legislation (e.g., the Hindu Widow's Remarriage Act), or on ground of custom, or on the principles of justice, equity and good conscience.

§ 110. Grounds of exclusion. (1) *Unchastity. Under Hindu law, a widow is enjoined to keep her husband's bed "unsullied." Hence unchastity of a widow disentitles her from inheritance. Under the Mitakshara, unchastity is a ground of excluding *only the widow*; so that a daughter, a mother or a sister can inherit even though not chaste at the time when inheritance opens (31 Mad. 100; 4 Bom. 104). An unchaste widow is not incompetent to inherit property of her husband's kinsmen as a widow of a gotraja sapinda (43 Bom. L. R. 338). According to the Dayabhaga law, chastity is a condition to the succession of all the five female heirs. Unchastity is a bar only to inheriting the property of a male, but not the stridhana of a female. Again, unchastity is a ground of exclusion only if it exists at the time when the inheritance opens. Subsequent unchastity of a woman, who has inherited the estate, being chaste at the time, would not divest the estate so vested in her (*Gangadhar v. Yellu*, 36 Bom. 168). The rule of Hindu law that unchastity is a bar to a widow inheriting her husband's estate would not apply in cases governed by the Hindu Women's Rights to Property Act, 1937, as the Act lays down that its provisions shall apply notwithstanding any rule of Hindu law or custom to the contrary (43 Bom. L. R. 338). Unchastity is, therefore, now a bar (1) to the widow inheriting her husband's agricultural land, as the Act does not apply to such a property, and (2) to the female heirs other than the widow under the Dayabhaga law.

(2) Remarriage. By remarriage, a widow forfeits the interest taken by her in her husband's property, and it passes to his next heirs as if she were dead. But a widow on remarriage does not lose her right to succeed to the estate of her son by her first husband (*vide* § 16).

* State the grounds on which a person is excluded from inheritance under Hindu law. How far does unchastity debar a female from succeeding to a male or a female? (April, 1926; Oct., 1923; April, 1933.)

Write short note on: Effects of unchastity of a Hindu female on her right of inheritance. (April, 1942, 1943.)

Discuss the causes of exclusion from inheritance under Hindu law. (Oct., 1930.)

(3) **Illegitimacy.** Illegitimate children have no right of inheritance, except in the case of their mother's stridhana and in the case of a *dasiputra* in the Sudra caste.

(4) **Physical and mental defects.** *The only defects, which now disqualify a person from inheritance or taking a share on partition, are congenital (1) *lunacy* or (2) *idiocy*. "Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, *other than a person who is and has been from birth a lunatic or idiot*, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect" (Sec. 2 of the Removal of Disabilities Act). But the Act does not remove the old disabilities so far as they affect a person's fitness for any religious office or service, nor does it affect the Dayabhaga law. The Act again is not retrospective. Under the old law (1) lunacy need not be congenital or incurable. It was sufficient if it existed at the time when the succession opened. (2) Blindness, deafness and dumbness, provided the defect was both congenital and incurable, disqualified a person. (3) The same was the case of a congenital want of any limb or organ. (4) Virulent incurable types of leprosy and similar diseases were also grounds of exclusion. But even under the old law, the disqualification on account of physical or mental defects did not prevent a sole surviving coparcener from holding the estate. If, on the death of all the other members, the disqualified member becomes the survivor he takes the whole property by survivorship (*Muthusami v. Meenammal*, 43 Mad. 464 ; 13 Pat. 712 ; A. I. R. 1942 All. 267). A coparcener who is afflicted by *non-congenital* lunacy does not thereby lose his status as a member of the coparcenary or forfeit his right to coparcenary property (38 Bom. L. R. 257). Even a *congenital* idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share. The affliction does not rob him of his birth-right to become a coparcener in the joint family estate with his father and the other members. The affliction merely prevents his enjoyment

* What is the rule of Hindu law relating to the exclusion of heirs from inheritance on grounds of physical and mental defects? How far is this rule affected by legislative enactment? (April, 1942.)

of the right while it lasts. His son has a right to share in the family estate (A. I. R. 1942 Mad. 698, F. B.).

(5) **Murder.** * No heirship to a murdered person can be claimed by or through a person who has been privy to his murder. A murderer cannot succeed as heir of the person whom he murdered nor can title be claimed through the murderer. The murderer should be treated as non-existent and not as one who forms a fresh stock of descent. The inheritance vests in those who would be entitled to it were the guilty heir dead. The test of disqualification of persons claiming through the murderer is not their relationship to the murderer but whether the title of heirship is traced through the murderer or in their own right. Thus, where the daughter of the last male-holder murdered his widow, the daughter's sons would be entitled to inherit to their grandfather's estate. Though they are related to the murderess, they do not trace their title through her. They are entitled to inherit in their own right as the daughter's sons, and it is not dependent on the estate first vesting in their mother and their getting it as her sons after her (A. I. R. 1942 Mad. 277).

In *Kenchava v. Girimalappa* (51 I. A. 361), it was contended that there was no text of Hindu law disqualifying a murderer from inheriting the property of the victim, but their Lordships held that even if he be not so disqualified, he should be excluded upon the principles of justice, equity and good conscience. A murderer should be treated as dead at the time when the succession opens, so that not only the murderer but also persons claiming heirship through him, such as his sister or mother, would be excluded. A person died leaving his mother C, and a son H and a daughter K of his father's brother, and his father's sister's son G. The mother C succeeded to the estate. H, who was the next heir, murdered the mother C. It was held that K, the sister of the murderer, could not succeed, as she could claim only through her brother who must be regarded as non-existent at the time. Therefore, G would succeed to the estate (*Kenchava's case*). But in Bombay, a widow succeeding as a widow of a gotraja sapinda is not disqualified from inheriting the property of a sapinda murdered by her husband, because she claims the right of inheritance, not through her husband, but in her own right as a widow of a gotraja sapinda (*Gangu v. Chandrabhagabai*, 32 Bom. 275). The principle upon which the decision in *Kenchava v. Girimalappa* seems to have been based is that a man should not be

* Discuss murder as a ground of exclusion from inheritance. (April, 1941.)

allowed to take advantage of his own wrong. A son was found guilty not of murder of his father, but of the offence of abetment of the murder, the murder, however, being not committed in consequence of the abetment (*i.e.*, of an offence punishable under section 115 of the Indian Penal Code). A person tried jointly with the son for the offence of the murder was acquitted. Hence, it was *held* that as the conspiracy of the son had not resulted in murder at all, or as the murder, though it was committed, did not take place as a result of the conspiracy, the son conspiring had not derived any benefit from the wrong which he committed by entering into the conspiracy, and consequently, the son was not disqualified from inheriting his father's estate (41 Bom. L. R. 561).

(6) **Adoption of a religious order.** This amounts to *civil* death. In order to exclude a person from inheritance on the ground that he has adopted a religious order, it is necessary to show absolute abandonment by him of all secular property, and a complete and final withdrawal from earthly affairs (33 Mad. L. J. 63). Where a Hindu made a will by which he retained entire control over his property during his natural lifetime, it was held that he did not lose his interest in it merely by his becoming a Sanyasi, and that he was competent to sell such property if he so chose (34 Bom. L. R. 852). In the case of Sudras, the order of Sanyasis being not open to them, renunciation of the world would not exclude them, unless a usage to that effect is established (46 All. 616).

(7) **Custom.** Persons otherwise qualified are in some communities or families excluded by custom. Such a custom excluding a daughter and her issue was proved in *Bajrangi v. Manokarnika* (9 Bom. L. R. 1349). But the onus of proving such a custom is on the person setting it up (10 Pat. 1).

Change of religion and loss of caste, which, under pure Hindu law, were recognised as grounds of exclusion, have ceased to be so since the passing of the Freedom of Religion Act. The disabilities which exclude a person from inheritance also exclude him from a share on partition.

The Privy Council, in a recent case, has held that Sec. 1 of the Freedom of Religion Act in terms applies only to protect the *actual* person who either renounces his religion, or has been excluded from the communion of any religion, or has been deprived of caste, and protects such person from losing any right of property or of succeeding as heir. The section does not apply to the children of such person, so that when

once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children (33 Bom. L. R. 1). Thus, where the question was whether a Hindu had any right to succeed to a Shia Mahomedan, a descendant of a Shia Mahomedan, who was originally a Hindu, it was held that the Act did not apply to protect the Hindu, and he was, therefore, not entitled to inherit. The view of the Allahabad and Lahore High Courts that the Section 1 protects *any person* from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste, is no longer good law.

§ 111. **Effect of disqualification.** Where a person is disqualified, the next heir of the deceased, takes the property as if the disqualified person were not existent at the time, the disqualified person and members of his family being entitled only to maintenance. The disability, however, is purely *personal* and does not exclude the issue of the disqualified person, if otherwise qualified. An exception is made in the case of an adopted son of a disqualified person, who is not entitled to any share of the property but can claim maintenance only. The disability in order to exclude a person must exist at the time when the inheritance opens or a partition is made. A subsequent disability would not divest a vested estate ; the only exception being the case of a widow forfeiting her husband's estate on remarriage. The right to inheritance or a share on partition would revive on the removal of the disability, but not so as to divest an estate vested in another. Thus, if a person dies leaving a widow, a son, who is blind, and a brother, the widow succeeds to the estate as his heir. If the blindness of the son is cured during the widow's life, it would revive his right to inherit. He cannot, however, divest the estate vested in the widow mother, but on her death he would succeed in preference to the brother.

Chapter XII.

STRIDHANA.

§ 112. **Stridhana and widow's estate.** * Property which may be owned by a woman is divisible into two kinds, *viz.*, (1)

* Distinguish between property which is stridhana and woman's property which is not stridhana. (April, 1942.)

How do you distinguish between 'Stridhana' and 'Widow's Estate'? Explain fully the nature and incidents of both. (April, 1944.)

property of which she is an absolute owner and (2) property of which she is a limited owner. The former is spoken of as her *stridhana*, the latter as her *woman's estate*.

These two species of woman's property differ in their *origin, enjoyment and ultimate devolution* : (1) A woman's estate arises generally in property obtained from *inheritance* or property obtained on *partition*. (2) A woman in the enjoyment of a woman's estate is not entitled to alienate the *corpus* of the estate, except in cases of necessity, while a woman is the absolute owner of her *stridhana* and can dispose of it at her pleasure, with some restrictions only during coverture. (3) A widow's estate is liable to be divested upon a subsequent birth or adoption of a son, or upon her remarriage. The *stridhana* is not liable to be divested on any account. (4) A woman's estate devolves on the next heirs of the last male owner, called the reversioners, and not on the woman's own heirs. On the death of a woman, her *stridhana*, however, goes to her own heirs.

§ 113. *Stridhana* according to Smṛiti-writers. The Smṛiti-writers did not use the term *stridhana* in its *etymological sense* as comprising any kind of property possessed by a woman, nor do they define what is meant by the term. They simply enumerate certain kinds of property, as constituting *stridhana*. Thus, Manu mentions the following six kinds of property :

- (1) *Adhyagni* or gifts made before the nuptial fire ;
- (2) *Adhyavahanika* or gifts made at the bridal procession ;
- (3) *Pṛitidatta* or gifts made through affection by the father-in-law and mother-in-law, and *Padavandanika* or gifts made at the time of making obeisance at the feet of elders just after the marriage ;
- (4) gifts made by the father ;
- (5) gifts made by the mother ; and
- (6) gifts made by the brother.

To this list, Vishnu adds (7) *Adhivedanika* or gifts made to a wife on supersession, *i. e.*, at the time of taking another wife, (8) gifts made *subsequent to the marriage* by her husband's relations and paternal relations, (9) *Sulka* or the fee for which a girl is given in marriage, and (10) gifts from sons and relations.

Devala mentions one more, *viz.*, (11) food and vesture. According to all the Smriti-writers, (12) ornaments given by the husband are stridhana property.

According to Yajnavalkya, "what was given to a woman by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on supersession, *and the rest (adya)*, is denominated stridhana. So what is given by kindred, as well as her marriage fee (*sulka*) and anything bestowed after marriage"

The kinds of property as enumerated by the Smriti-writers constitute what is called *technical* or * *paribhashika* stridhana, as distinguished from *aparibhashika* or stridhana in its literal or etymological sense. It may be noted that *technical* stridhana includes only (1) gifts from relations made at any time, (2) ornaments and apparel, and (3) those gifts from strangers which are made before the nuptial fire or at the bridal procession but not at any other time. Acquisitions of a woman by her labour and skill are expressly excluded from stridhana by Katyayana.

§ 114. **Stridhana according to commentators. Mitakshara.** † Vijnaneshwara, the author of the Mitakshara, adopts the definition of Yajnavalkya and expands it thus : "What was given by the father, by the mother, by the husband, or by a brother ; and what was presented by the maternal uncle and the rest at the time of the wedding before the nuptial fire ; and a gift on a second marriage or gratuity on account of supersession ; and as indicated by the words '*and the rest*' (*adya*), property *obtained by a woman by* (1) *inheritance*, (2) *purchase*, (3) *partition*, (4) *seizure*, *i. e.*, adverse possession, *and* (5) *finding*, all this is stridhana according to Manu and the rest."

Further on, Vijnaneshwara expressly states that the term

* Explain the following terms : Paribhashika Stridhana, Sulka, Saudayika. (Oct., 1925.)

Discuss the characteristics of the various types of stridhana. (Oct., 1941.)

† Fully discuss the definition of stridhana as expounded in the Mitakshara, and state how far it represents the present law. (April, 1929.)

Define Stridhana with its essential features. Compare and contrast the Dayabhaga idea of Stridhana with that of the Mitakshara. Does the Privy Council endorse the Mitakshara idea of Stridhana as enunciated by Vijnaneshwara? (April, 1931.)

stridhana conforms in its import to its etymological sense and is not technical. The result is that according to the Mitakshara *property of any description in the possession of a woman* is stridhana. No ancient sage had mentioned any of the kinds of stridhana into which Vijnaneshwara expands the word *adya* in the second part of his definition, but he explains this silence on the part of the Smriti-writers by saying that Manu by mentioning six kinds of stridhana meant that the number cannot be less than six, not that it cannot be more than six. But since the decision of the Privy Council in *Debi Mangal Prasad v. Mahadev Prasad* (39 I. A. 121), the expansion by Vijnaneshwara has gone by the board (*vide infra*).

Mitakshara sub-schools. (1) Bombay school. *The Mayukha seems to adopt the definition of the Mitakshara, and for the purpose of determining the order of succession to stridhana on the woman's death divides stridhana into (i) technical, or stridhana recognised by the old sages, and (ii) non-technical stridhana, or every other kind of property in the possession of a woman. The order of succession is different in the two kinds.

(2) The Benares school adopts the definition of the Mitakshara.

(3) The Mithila school restricts stridhana to the technical stridhana, *i. e.*, the stridhana of the Smriti-writers.

(4) The general rule in the Madras school is to adopt the Mitakshara definition, unless all the authoritative commentaries of the province unanimously exclude the kind of property in question from the category of stridhana.

Dayabhaga school. The rule laid down by Jimutvahana is : " That alone is stridhana which a woman has power to give, sell or use independently of her husband's control." But he does not mention what kinds of property a woman can dispose of independently of her husband. In the light of his discussion and of the texts cited by him, it may be said that in the Dayabhaga school, stridhana comprises all gifts from relations, except a gift of *immovable property from the husband*, and those gifts from strangers which are made before the nuptial fire or at the bridal

* What is stridhana according to the Mayukha ? (April, 1942.)

procession. But property obtained by inheritance or partition, or acquired by mechanical arts is not stridhana. Thus the distinction between the Mitakshara and the Dayabhaga stridhana is that the former seems to apply the term broadly to every kind of property which a woman can possess, from whatever source it may be derived, while the Dayabhaga limits the term, applying it exclusively, or nearly exclusively, to the kinds of property enumerated in the Smritis (*Sheo Shankar v. Debi Sahai*, 30 I. A. 202).

§ 115. *Privy Council and Mitakshara Stridhana. It has been held by the Privy Council that property acquired by a woman from *inheritance*, whether to a male or female, and property acquired by her on *partition* are not her stridhana properties. Thus in *Bhugwandeem v. Myna Baee* (11 M. I. A. 487), it was held that property inherited by a widow from her husband was not stridhana property. In another case, it was held that property inherited *from a female*, e. g., by a daughter from her mother, was not stridhana property (*Sheo Shankar's case*). As to a share obtained by a widow on *partition* it was held in *Debi Mangal Prasad v. Mahadeo Prasad* (39 I. A. 121) that it was not stridhana property of the widow.

These two, *viz.*, property acquired by *inheritance* and property acquired on *partition*, are two of the five sorts of stridhana added by Vijnaneshwara in his expansion of the word *adya* in his definition of stridhana. The cases referred to above were cases from the Benares school, but the law laid down by them governs all the Mitakshara schools. Only in the case of Bombay, a long current of decisions has firmly established that property *inherited* by a woman is her stridhana, except where it is inherited from a *male* into whose family she has entered by marriage (*vide infra*).

§ 116. Sources of Stridhana. A woman may acquire property from various sources. In order to determine whether a particular property is stridhana or not, we must ascertain (1) the *source* from which the property has been acquired, (2) the particular *school* to which the woman acquiring the property belongs,

* Is there any distinction under Hindu law between property inherited by a female from a male or a female? State clearly with special regard to the devolution and powers of the female heirs over such property, noting the difference between the Bombay school and the other schools of Hindu law. (Oct., 1931.)

and (3) the *time of acquisition*, that is, whether the woman acquired the property in question during her maidenhood, or during coverture, or during widowhood.

The following are some of the modes by which woman can acquire property:

- (1) Property obtained by inheritance.
- (2) Property obtained on partition.
- (3) Property given in lieu of maintenance.
- (4) Property obtained from relatives as gifts or bequests.
- (5) Property obtained from strangers as gifts or bequests.
- (6) Property acquired by mechanical arts.
- (7) Property acquired by adverse possession.
- (8) Property obtained by compromise.
- (9) Property obtained with the aid of stridhana or with the income derived from stridhana.

Excepting the cases of property obtained by inheritance and property obtained by partition, property acquired by a woman from any of the other sources is her stridhana. In the Dayabhaga and Mithila school, however, gifts or bequests from strangers *during coverture*, and property acquired by mechanical arts *during coverture*, are not stridhana ; but according to the Dayabhaga, if the woman survives her husband, such property becomes her stridhana after her husband's death, though not so under the Mithila law. * In Bombay, property inherited from a *female*, i. e., the stridhana of a female (*Gandhi Mangaldas v. Bai Jadav*, 24 Bom. 192), or from a *male* into whose family the woman inheriting was born (*Pranjivandas v. Devkuverbai*, 1 Bom. H. C. 130) is stridhana property. Where, however, the property is inherited from a male into whose family the *female heir entered by marriage*, the property is not stridhana of such female and she takes only a woman's estate in it (*Gadadhar v. Chandrabhagabai*, 17 Bom. 690). But even in this latter case, a widow under the Mayukha law has the power of disposal during her life over inherited *moveables* (32 Bom. L. R. 1217). In a recent case, it has been held that the same rule applies to moveables *acquired on partition* and that the widow has an unrestricted power of disposal

* Comment briefly upon : The stridhana of the Bombay school is more extensive than the stridhana of any other school. (Oct., 1923.)

during her life-time over such moveables (*Chamanlal*, 36 Bom. L. R. 152). However the dispositions referred to above are *inter-vivos* and not testamentary (17 Bom. 690).

Though ordinarily a woman does not take the share obtained on partition as her stridhana, yet the members effecting a partition may agree that a portion of the family property shall be transferred to her by way of absolute gift, as part of her stridhana (*Debi Mangal Prasad's case*). Thus where a deed of partition confers upon the mother an absolute estate in the share allotted to her, she takes the share as her stridhana.

If any property comes within the description of stridhana, the fact that it is a kind of property not known to Hindu law when the commentaries were written does not affect its character.

§ 117. Rights of woman over stridhana property.

*The rights of a woman over her stridhana are not the same at all the stages of her life. They differ according to the state of the woman, as to whether she is a maiden, a married woman or a widow.

(1) During *maidenhood*, a Hindu female can dispose of her stridhana of every description at her pleasure. The only disqualification that may affect her is one by reason of minority, in which case she cannot alienate her property except through her guardian nor can she make a will disposing of her stridhana. It may be noted that according to the Bombay school, property inherited by a maiden would constitute her stridhana, as she can inherit only as a daughter of the family.

(2) During *coverture*, a woman can dispose of only that kind of stridhana, which is *Saudayika*. †*Saudayika* stridhana is constituted by the gifts made through affection at, before, or after marriage by her parents and their relatives, and by her husband and his relatives. It is defined to be gifts from affectionate kindred

* What are the rights of a Hindu woman over her stridhan? (Oct., 1924.)

What are the principles of law relating to the rights of women over stridhana? (April, 1943.)

Discuss the rights of a Hindu female over her Stridhana during (i) maidenhood, (ii) coverture, and (iii) widowhood. (Oct., 1943.)

What power of disposal has a Hindu woman got over her stridhana? (Oct., 1932.)

† Distinguish between *Saudayika* and non-*saudayika* stridhana. (Oct., 1941.)

(39 Mad. 298). In other words, Saudayika stridhana means the gifts (or bequests) from relations as distinguished from gifts from strangers. Stridhana property other than Saudayika constitutes non-saudayika stridhana.

A woman can alienate her *saudayika* stridhana at her pleasure without the consent of her husband. Thus it was held that the property bequeathed to a woman by her maternal grandfather, being her *saudayika* stridhana, she could alienate it without the consent of her husband (*Venkaraddi v. Hanmantgouda*, 34 Bom. L. R. 1144). The husband has no control over it and cannot bind her with any dealings with it ; but he can *use it in cases of distress*, such as a famine, or during illness or imprisonment. But this right is personal to him, and if he does not choose to exercise it, the stridhana property cannot be taken by his creditors in execution of a decree against him (*Chetti v. Thayyarammal*, 50 Mad. 941). In the case of the *non-saudayika* stridhana, the rule is that a woman has no power to dispose of it during coverture without her husband's consent. It is subject to her husband's dominion, and he is entitled to use it at his pleasure *even if there be no distress*. After her husband's death, however, her power of disposal over it becomes absolute. Even in case the woman dies during her husband's lifetime, it passes to her heirs and the husband's existence is no obstruction to the devolution.

The word "coverture" is synonymous with marriage. A woman during coverture is simply a married woman. A woman does not cease to be under coverture because she ceases to live with her husband. A and his wife B had lived apart for some 20 years. B made a will, whereby she left her non-saudayika stridhana to her niece. The will was made without A's consent, and hence in a suit by A, it was held that the disposition in favour of the niece was not valid (45 Bom. L. R. 473).

(3) During *widowhood*, a woman can dispose of her stridhana of every description at her pleasure, whether it was acquired before or after his death.

The judicial decisions on the subject ignore the distinction made by the Sanskrit texts between *saudayika* given by the husband and that by other relations, a woman's rights being restricted in the case of the former. Instead of this distinction, we have a simple rule for all kinds of *saudayika* based upon the distinction of *absolute grant* and *limited grant*. The test then to determine whether *saudayika* can be disposed

of at pleasure is to ascertain whether the gift passes an absolute estate or a limited one (*vide* the Chapter on Gifts and Wills).

A Hindu wife is competent to contract but her liability under it is limited to the extent of her stridhana.

§ 118. Succession to stridhana. The order of succession depends upon three considerations, *viz.*, (1) whether the woman was married or unmarried, and in case of a married woman, whether the marriage was an approved or unapproved one, (2) the school to which she belonged, and (3) the source of the stridhana.

1. **Succession to a maiden.** * The following is the order of succession to a *maiden* according to all the schools : (1) uterine brother ; (2) mother ; (3) father ; (4) father's heirs, *i. e.*, her father's sapindas, samanodakas and bandhus, in the order of propinquity ; (5) her mother's heirs in the order of propinquity.

2. **Succession to a married woman.** (Mitakshara law). For the purposes of succession, the Mitakshara divides stridhana into (a) *Sulka* and (b) stridhana other than *Sulka*.

(a) *Sulka* devolves in the following order : (1) uterine brother ; (2) mother ; (3) father ; (4) father's heirs.

All the sub-schools of the Mitakshara follow this order, but their definition of *Sulka* varies. †According to the Mitakshara and the Virmitrodaya, *Sulka* means a gratuity for which a girl is given in marriage. Under the Mayukha and the Madras school, it is the property given as equivalent of household utensils, of beasts of burden, of milch cattle and of ornaments. In the Mithila school, it is the property received by a woman at the time of her marriage, when the marriage is in the unapproved form. The Dayabhaga defines it as a present to induce the bride to go to her husband's house.

(b) *Stridhana other than sulka.* The Mitakshara prescribes the following order of succession to stridhana property other than *Sulka* : (1) unmarried daughter ; (2) married daughter who is not provided for ; (3) married daughter who is provided for ;

* State the order of succession in the Mitakshara to the stridhana or riktha of a maiden. (April, 1942.)

† What is *Sulka* ? (Oct., 1941.) In what order *Sulka* passes on succession ? (April, 1941 ; Oct., 1940.)

(4) daughter's daughter ; (5) daughter's son ; (6) son ; (7) son's son.

If a marked difference is found in the financial positions of the sisters and one of them is in strained circumstances, that is sufficient to bring into operation the authority of the Mitakshara that the sister who is "unprovided for" shall take precedence over the sister who is "enriched." The case has to be looked at from the point of view of comparative poverty of the claimants (*Manki Kunwar v. Kundan*, 47 All. 433). Unmarried daughters are preferred to married daughters, but no preference is given to daughter's unmarried daughters over daughter's married daughters (*Ram Kali v. Gopal Dei*, 48 All. 648).

The stridhana of a *remarried* widow is inherited equally by her son by the first husband and her son by the second husband (*Bapu v. Kashinath*, 1934, 36 Bom. L. R. 140).

In the absence of legitimate children, illegitimate children of a Hindu woman are entitled to succeed to her stridhana (38 Mad. 1144; 34 Bom. 553). If the woman dies leaving legitimate and illegitimate children, the former would exclude the latter. But the right of illegitimate children does not extend beyond the stridhana of their own mother. Hence, apart from a special custom, an illegitimate daughter of a Hindu woman is not entitled to succeed to the stridhana of her mother's mother (I. L. R. 1940 Mad. 739). The general principle of Hindu law is to limit heirship to legitimate issue except in the case of illegitimate sons amongst Sudras, in whose favour an exception is made by special texts.

Mayukha succession to a married woman. *For the purposes of succession to the stridhana of a married woman, the Mayukha divides the stridhana into (1) technical, *i. e.*, gifts and bequests from relations made at any time, and from strangers before the nuptial fire or at the bridal procession, and (2) non-technical.

The technical stridhana is again subdivided into (i) *sulka*, (ii) *yautaka* or gifts at the time of the marriage, whilst seated with the husband on one seat (from *yuta* or "joined together"), (iii) *bhartrudatta*, or property given or bequeathed to a woman by her husband, and *anwadheyaka*, or property given or bequeathed to a woman subsequent to her marriage by her father's relations or by her husband's relations, and (4) other kinds of technical stridhana.

* State what constitutes non-technical or improper stridhana under the Mayukha. (April, 1932.)

Write short note on: Technical and non-technical stridhana. (April, 1943.)

(1) **Sulka** devolves in the same order as in the Mitakshara.

(2) **Yautaka** goes first to unmarried daughters, then to married daughters, and then to their issue.

(3) **Bhartrudatta** and **Anwadheyaka** pass in the following order : (1) sons and unmarried daughters taking together in equal shares ; (2) daughters' daughters and daughters' sons ; (3) sons' sons.

(4) **Other kinds of technical stridhana** pass in the following order : (1) unmarried daughter ; (2) married daughter who is not provided for ; (3) married daughter who is provided for ; (4) daughters' daughters and daughters' sons ; (5) sons ; and (6) sons' sons.

Non-technical stridhana passes in order to (1) sons ; (2) sons' sons ; (3) sons' sons' sons ; (4) daughters ; (5) daughters' sons ; and (6) daughters' daughters.

Mitakshara and Mayukha succession to stridhana. * The main points of difference are : (1) The Mitakshara prescribes one order of succession for all kinds of stridhana except sulka ; the Mayuka draws a distinction between technical and non-technical stridhana and prescribes five different modes of devolution in all. (2) According to the Mitakshara, all stridhana goes first to the female issue and then to the male issue ; according to the Mayukha, the non-technical goes first to the male issue and then to the female issue, and the bhartrudatta and anwadheyaka goes to the male and female issue together.

3. **Woman dying childless.** If a woman dies childless, then according to the Mitakshara, her stridhana (excepting *sulka*) goes to her husband and then to his heirs, if she was married in the approved form. If she was married in an unapproved form, it goes first to her mother, then to her father, and then to her father's heirs, i. e., to his sapindas, samanodakas and bandhus in order of propinquity. † The same rules would apply to the Mayukha succession to a childless woman, though the Mayukha

* What is the difference in succession to stridhana property between the Mayukha and the Mitakshara ? (Oct., 1924 and 1927 ; April, 1930.)
Point out and discuss any two differences between the Mitakshara and the Mayukha law. (April, 1941.)

† Indicate briefly the difference between the Mitakshara and the Mayukha schemes of succession to stridhana property of a married woman dying without issue. (Oct., 1929.)

seems to prescribe a different order in the case of a woman married in the approved form. According to the Mayukha, in such a case the stridhana goes to the husband, and failing him to *her heirs in the husband's family*. This apparent distinction in words does not make any difference, because under Hindu law a woman on marriage becomes the sapinda of her husband. Hence, the husband's heirs *as such* are also the persons who are the *woman's heirs in her husband's family*.

On failure of her husband's heirs, the stridhana of a widow does not *escheat*, but goes to her blood relations, *i. e.*, to her mother, father, father's heirs and mother's heirs, in preference to the Crown (*Ganpat v. Secretary of State*, 45 Bom. 1106).

Reason of distinction between forms of marriage. The distinction between marriage in one of the four approved forms and marriage in one of the four unapproved forms rests on the important ground that in the case of an approved marriage the woman ceases to belong to her father's family and enters the husband's family and takes his *gotra*, while in an unapproved marriage, as she has not been given away by the father in marriage, she continues to be a member of the father's family, and, therefore, her *gotra* continues to be the father's and not the husband's. The result is that in the latter case the husband and his kinsmen do not come in the order of succession at all, and the property goes to her issue and then to her mother, father, the father's heirs and the mother's heirs respectively, while in the former case it goes to her issue, then to her husband, husband's heirs and her own blood relations, successively (36 Bom. 339). Thus, in the case of an *unapproved* marriage, the brother is preferred to the sister because he is a nearer heir than the father, and that would also be the result in the case of succession to a maiden though not for the same reason, but because the brother is mentioned first even before the parents, in the special order of succession. But the result would not be the same in case of succession to a woman married in an *approved* form. As her *gotra* is her husband's, her relations in her father's family are not her *sagotra sapinda* but *bhinnagotra sapindas*, *i. e.*, bandhus, while in the case of a maiden as well as a woman married in an unapproved form, they remain her *sagotra sapindas*. The distinction is important because if they take as bandhus, the Mitakshara rule is that they take in order of propinquity, that bandhus related equally take in equal shares and no preference is given to males over females (47 Bom. 48). The result would be that the brother and sister would divide the property between themselves in equal shares (*Vithal v. Balu*, 1936, 38 Bom. L. R. 520).

Chapter XIII

WOMAN'S ESTATE

§ 119. **Female heirs.** As we saw, a woman does not take as her stridhana property *inherited* by her, except in certain cases in the Bombay Province. So also, a woman does not take absolutely the share obtained by her on partition, unless the members who are parties to the partition confer on her an absolute estate in the property which has come to her share. The estate which a woman takes in such property is called a *limited* or *woman's* estate. The term *widow's estate* is also used to denote such an estate, because the estate taken by a widow in her husband's property is the typical kind of the estate taken by any other limited heir. An estate similar to the widow's estate can also be created by a gift or will, which does not by words of sufficient amplitude confer upon the female donee or legatee an absolute estate.

A widow may *by custom* be entitled to her husband's property absolutely as her stridhana (*Hukumchand v. Sital Prasad*, 50 All. 232). For instance, a Jain widow, *by custom of the community*, was held to take as stridhana *separate* property of her husband inherited by her, but that in the ancestral property, she took the usual woman's estate (29 All. L. J. 314). But the Bombay High Court has recently held that no custom has been established in Bombay that a Jain widow is an absolute owner of the immovable properties inherited from her husband. Her powers in the immovable properties are not larger than those of an ordinary Hindu widow (*Bhikubai v. Manilal*, 32 Bom. L. R. 1217). In the Mithila school, a childless widow has an absolute power of disposal over *movable* property inherited by her from her husband (48 Cal. 100 P. C.; A. I. R. 1937 Pat. 483).

Thus a woman is presumed to acquire only a limited estate in property obtained by inheritance, partition, gift or devise. She takes an absolute estate only in the following cases : (1) female heirs in Bombay, except those coming into the family of the male *propositus* by marriage ; (2) on the ground of custom (3) on partition, if the members confer on her an absolute estate ; (4) in the case of Jain widows, and widows in the Mithila school, to the extent mentioned above ; (5) a gift or bequest or other arrange-

ment conferring on her an absolute estate by words of sufficient amplitude ; and (6) her stridhana property.

§ 120. Nature of widow's estate. * It should not be supposed that, though a widow takes as heir only a specified and qualified estate, she is a mere life-tenant of the property, as being merely entitled to the *enjoyment* of the property without any power of disposal over it. A widow or other limited heir is the *owner* of the property inherited by her, subject to certain restrictions on alienations, and subject to its divestiture on adoption or devolution upon the next heir of the last full owner upon her death. "Her right is of the nature of a right of property ; her position is that of the owner ; her powers in that character are, however, limited ; but so long as she is alive no one have any vested interest in the succession" (*Janaki Ammal v. Narayansami*, 43 I. A. 207 at p. 209).

Incidents of the estate. (1) The woman holding the widow's estate is entitled to absolute *possession* of it. If she is dispossessed of any portion of it, she can sue to recover it.

(2) She is entitled to the beneficial *enjoyment* of the estate, and to the whole income of the property, which she may spend in any way she likes. She need not pay out of the income charges which should properly be paid out of the estate. She may throw the burden of paying her husband's debts, or the maintenance or marriage expenses of the members of her husband's family on the *corpus* of the estate, and meet these expenses by selling or mortgaging the estate. The holder of the estate is, however, to pay from the estate the debts of the last male holder from whom she acquired the estate. Even where the widow gets the interest of her husband in the joint family property under the provisions of the Hindu Women's Rights to Property Act, she is bound to pay out of the interest her husband's debts (A. I. R. 1942 Mad. 212).

* Discuss the nature of property inherited by a Hindu widow from her husband. (April, 1925 ; 1927 ; 1932.)

Explain the term "Widow's estate." (Oct., 1921 ; 1923 ; 1940 ; 1941.)

State briefly the peculiar features of a widow's estate. (April, 1933.)

What are the incidents of the widow's estate ? (Oct., 1940.)

Summarise the powers of a Hindu widow in respect of immoveable and moveable property inherited by her from her husband. (Oct., 1940.)

(3) She can transfer her *life-interest* even without necessity, and such an alienation would be good during her life-time unless she remarries.

(4) One of the necessary incidents of a Hindu widow's estate is to give to the female owner power to transfer the *corpus* of the estate *absolutely* in case of legal necessity.

(5) The estate vests in her and she is *owner* thereof during her lifetime, the only restriction on her powers being that she cannot alienate the *corpus* of the estate except in certain specified cases. She does not, however, become a fresh stock of descent, and on her death, it devolves to the next heir of the last full owner and not to her stridhana heirs.

(6) During her lifetime, she completely *represents* the estate, and is entitled to sue and is liable to be sued in respect thereof. Decrees passed against her as *representing* the estate in respect of transactions binding upon the estate, are binding not only upon her, but on the reversioners, *i.e.*, the heirs of the full owner who will take the estate on her death.

(7) She is entitled to manage the estate, and will be allowed reasonable latitude in the management so long as she acts fairly to the expectant heirs. But when she commits, or threatens to commit, waste or any act injurious to the reversion, she may be restrained by an injunction.

(8) Her life-interest in the estate is liable to be seized and sold in execution of a decree against her for her personal debts.

(9) The estate is liable to be divested on her remarriage, or the subsequent birth or adoption of a son, but not on her subsequent unchastity.

The restrictions on a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend upon the existence of heirs capable of taking it on her death (*Collector of Madura v. Mootoo Ramalinga*). The Crown in such a case taking by escheat can impeach her unauthorised alienations. Her alienation, in excess of her powers, is not absolutely void but is only voidable at the election of those who would be entitled to the property by survivorship, inheritance or escheat. A stranger to the reversion cannot question it (13 Pat. 182). A Hindu widow cannot, by an act or declaration of her own, while retaining

possession of her husband's estate as such, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow.

Widow's estate and life-estate. The widow's estate is not a mere life-interest. The holder of a life-estate has not the whole estate but only *the right to enjoy the estate for his life, unattended with power of alienation*. A Hindu widow, however, has the whole estate vested in her, she fully represents it and a decree passed against her with reference to the estate is binding upon the reversioners. She has also under certain circumstances power to alienate the estate so as to pass an absolute and complete title.* "According to Hindu law, a widow who succeeds to the estate of her husband in default of male issue . . . does not take a mere life-estate in the property. The whole estate is, for the time, vested in her ; though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband" (*Moniram v. Keri Kolitani*, 5 Cal. 776, P. C.). The main difference between the absolute (*i.e.*, *stridhana*) and the limited estate in Hindu law (*viz.*, widow's estate) is that a woman has larger powers of disposal over the former than over the latter. Thus the essential basis of classification of estates in Hindu law is the power of user over them and not their duration as in the English law of property. "Hindu law measures estates not by duration but by use."

§ 121. **Income and accumulations of income.** †Although the interest of limited owner in the estate is restricted, her interest *in the income* from it is unrestricted. She is entitled to use the entire income at her pleasure, or give it away, in whole or in part, as she chooses *inter vivos* or by will (A. I. R. 1938 All. 426, F. B.). She is not a trustee for the reversioners, so as to be under an obligation to save, or pay the lawful charges on the estate from the income and not from the *corpus*, and thus pass it on to them undiminished on her death (A. I. R. 1937 Pat. 325). There is *no presumption* that the income from her limited estate and the property acquired by her out of such income form an accretion to the estate and pass as such.

A widow is not bound to save from the income. She may spend the whole income as she chooses. There may, however, be

* Comment briefly upon the following : "Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates not by duration but by use." (Oct., 1922.)

† Discuss : "A Hindu widow is not a trustee for the reversioner." (Oct., 1940.)

(1) savings made by the widow, whether invested or not, or
 (2) savings otherwise than by the widow. The question, then, arises whether she has the same powers over these accumulations, as she has over the income itself, or they form a part of the estate itself.

(1) **Accumulations by the widow.** * In the first kind, the accumulations may have been made by the widow personally, (i) when only the income is granted to her by a deed or will and the estate is granted to another, or (ii) when the estate has vested in her as heir to her husband.

In (i), the savings from such income cannot form an accretion to the estate, because the estate is in the hands of others. "In order that there may be accretion, there must be an estate to which accumulation accrete." The widow does not take them as savings of a widow's estate vested in her but as a taker of a life-estate under the settlement or will (*Isri Dutt v. Hansbutti*, 10 I. A. 150). Similarly, savings from maintenance allowance directed to be paid to her out of the husband's estate, and property purchased out of such savings, are her stridhana and on her death pass to *her* heirs.

In the second case, there being no presumption that such savings form part of the estate, the question falls to be considered from the *intention of the widow* to be gathered from her dealings with the fund. (a) If she does nothing to indicate an intention to make the savings part of the estate or to justify the inference that she wished them to revert to her husband's heirs, the savings are her stridhana which she may dispose of by deed or will. (b) If she does indicate any such intention or does any act to justify any such inference, she takes only a widow's estate in them. (c) In case, however, of income *held in suspense*, i.e., the income as to which there is no evidence that she had indicated her intention either way, such income would constitute her stridhana and on her death will pass to her stridhana heirs. Such are the arrears of income due to the widow at the time of her death, or the accidental balances of a year or two, which do not constitute *accumulations* or *savings* (*Rivett-Carnac v. Jivibai*, 10 Bom. 478).

* Discuss the rights of a Hindu widow to savings by her from her husband's estate. (Oct., 1922.)

If the widow does not keep the savings and the estate separate but blends the two together, it is a sufficient indication of her intention to treat the savings as part of the original estate. Thus, where a widow inherited landed property in a village from her husband and with the income purchased other lands in the same village, and long after the purchase, made a gift of *both* the original estate and the after-purchases to the daughter, it was *held* that the after-purchases constituted an accretion to the estate and the gift failed (*Isri Dutt v. Hansbutti*, 10 I. A. 150). Where, however, a widow purchases property out of borrowed money or out of the savings in the *name of another person*, or purchases land with the savings and soon after makes a gift of the purchased property, the acquisition cannot be treated as accretion to the original estate.

In a recent case, the Calcutta High Court held that though a widow can dispose of savings of income and property purchased out of them which she has treated as her own during her life-time, she cannot dispose of them *by will*, and on her death, they will descend not to her stridhana heirs but to her husband's heirs (*Sarat Chandra v. Charusilla*, 55 Cal. 918). And this rule was applied even to income *held in suspense*.

(2) **Savings otherwise than by widow.** In the second class of accumulations would come (i) accumulations of the income during the life-time of the husband or other male from whom the widow inherited the property, (ii) accumulations of the income after his death and before delivery of the estate to her, and (iii) enlargement of the estate otherwise than by savings.

In (i), the accumulations would form part of the *corpus*, and the woman succeeds to the income in the same way as she succeeds to the property for a woman's estate.

In (iii) also, the enlargement is an accretion to the estate and the widow takes only a widow's estate in the enlarged estate. Such an enlargement may take place by the Government conferring a larger grant, or by compromise with a superior owner, or otherwise.

Cases falling under (ii) may arise when the possession of the estate is withheld from her, and the estate together with the accumulations is eventually handed over to her long after her husband's death, or the *corpus* of the estate is bequeathed to others

and there is intestacy as to the income which is handed over to the widow long after her husband's death. As the accumulations accrue after the husband's death, the widow does not take them by succession as in (i), but in the same way as she would have taken the income itself had she been let into possession at once. Hence, here also, the test is the intention of the widow to treat them as her own separate property or as accretions to the estate, as in the case of savings made by the widow personally when she succeeds as heir (*Saodamini Dosi v. Administrator-General of Bengal*, 20 I. A. 12). A Hindu made provision for the maintenance of his widow and bequeathed his property to his brother if no adoption as directed by him was made to him by his widow within eight years of his death. The will made no provision with regard to the income of the estate during the eight years and the widow became entitled to it as on intestacy. No adoption was made within the above period and the estate vested in the brother. He paid to the widow a sum of money in satisfaction of her claim to the accumulations. The widow invested the fund, and then made a will creating a trust for the benefit of herself and her grandson. It was *held* that the will was valid and the grandson was entitled to take the benefit under it as against the brother's claim to succeed to the fund as the next heir of the last full owner, because the widow took the sum as her stridhana, since she had done nothing to indicate an intention to make it a part of her husband's estate (*Saodamini Dasi's case*).

§122. Alienations by the widow. A widow can alienate (1) her life-interest in the property, or (2) the whole or part of the estate in certain specified cases so as to bind even the reversioners.

(1) **Alienation of life-estate.** A widow can alienate her life-interest in the property for any term of years, or until her death or divestiture on adoption or remarriage. It is not necessary in this case that the alienation should be supported by a legal necessity, and it need not be for value, as she can even make a gift of it. As to the right of co-widows, see § 97.

(2) **Alienation of estate.** * In the following circum-

* Specify the cases in which alienations made by a Hindu widow of immovable property inherited by her from her husband will be upheld. (April, 1928.)

stances, alienation by the widow of the whole or part of the *corpus* will be upheld so as to bind the reversioners ; but the power of alienation, when it exists, must be exercised by an act *inter vivos* and not by a will :

(i) There is a *legal necessity*.

(ii) There is *consent* of the next reversioner so as to raise a presumption that a legal necessity exists or that there are reasonable grounds for such belief.

(iii) It is a *surrender* of the whole of her interest to the whole body of the next reversioners, and is not a device to divide the estate.

(iv) The alienation is made for the *benefit* of the estate.

(v) The alienation is made by the widow while conducting the business of her husband for the necessary purposes of that business.

(vi) It is under a *compromise* or a family arrangement, in the nature of a *bona fide settlement* of disputes in respect of the estate, *even though the reversioners are not party to it*.

(vii) It is under a *prudent and reasonable compromise* between the widow and the next reversioner.

(viii) The alienation is made with the *leave of the Court* after the widow has obtained letters of administration to her husband's estate.

(ix) In a case governed by the *Mayukha* the alienation is by the widow of her husband's *movables* (*Bhikubai v. Manilal*, 32 Bom. L. R. 1217).

"The power of a Hindu widow to alienate the estate inherited by her for purposes other than religious or charitable is analogous to that of a manager of an infant's estate as described in *Hanoomanpersaud v. Mst. Babooee*. She can alienate it, not only

Discuss the conditions under which a Hindu widow in the enjoyment of a widow's estate can convey a greater interest than she herself has. (Oct., 1930.)

Under what circumstances and to what extent can a limited heir alienate immoveable property inherited by her from the deceased owner? (April, 1942.)

Discuss the circumstances in which a widow can convey an absolute estate. (Oct., 1940.)

for legal necessity, but also for the benefit of the estate" (*Per Sir Shadi Lal in Venkata v. Subbaya*, 38 Bom. L. R. 1229, P. C.).

A widow has no power to make a will of her widow's estate (8 M. I. A. 529, P.C.). A legatee under a will made by a Hindu widow does not take any interest whatsoever, not even a voidable interest (6 Pat. 788). Such a legatee derives no title under the will, not even to maintain a suit in ejectment against a trespasser (A. I. R. 1924 Mad. 576).

§ 123. **Alienation for necessity.** The following have been held to be purposes justifying alienations on the ground of necessity or benefit of the estate :

(1) The funeral expenses and sraddha ceremony of the husband and of the persons whose ceremonies the husband was bound to perform, *e.g.*, sraddha of her husband's mother.

(2) Acts which, although not essential or obligatory, are still pious observances conducing to the spiritual welfare of her husband. Such acts do not include those which conduce to the spiritual benefit of the widow only. "For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, a widow has a larger power of disposition than that which she possesses for purely worldly purposes" (*Collector of Masaulipatam v. Cavalry Vencata*, 8 M. I. A. 529).

(3) Payment of debts of the last full owner, even though time-barred, provided they were not repudiated by him (1935. 57 All. 672).

(4) Payment of Government Revenue or other dues, the non-payment of which would imperil the estate, such as decrees for rent.

(5) Reasonable costs of litigation necessary in recovering or preserving the estate, or in defending her rights, or other necessary legal expenses, such as the cost of obtaining a succession certificate.

(6) Maintenance of herself and persons whom the last full owner was morally or legally bound to maintain.

(7) Marriage expenses of the relations of the last full owner. Marriage of her own daughter by a second husband is not a legal necessity justifying an alienation of the first husband's property (55 All. 157).

(8) Gift of a *reasonable amount* to her daughter and son-in-law on the occasion of their marriage.

(9) The protection and preservation of the estate, such as costs of repairs and other expenses necessary to the well-being of the estate.

(10) Payment of debts properly incurred by her in connection with the family business inherited by her.

An alienation without necessity is not void but *voidable* at the instance of the reversioners. It is the reversioner alone who can impeach an alienation by a limited owner. The reversioners may elect to ratify the alienation and claim benefit thereof (A. I. R. 1941 Mad. 345) or treat it as a nullity. If the reversioners do not choose to impeach it, nobody else can. Again an alienation of the estate without necessity would pass the widow's life-interest only and as such will be good during her lifetime, and will be binding on her so far as her interest in the property is concerned.

The Hindu system recognises two sets of religious acts, one in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rights prescribed in the texts, which are essential for the salvation of the deceased; the other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With reference to the first class of acts, the powers of a Hindu female, who holds the property, are wider than those in respect of acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she can sell the whole of it. In the other case, she can alienate a *small portion* of the property for the pious or charitable purpose she may have in view. If the property sold or gifted bears a small proportion to the estate inherited, and the occasion of disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioners (44 All. 503, P. C., 12 Pat. 727). Thus, a sale by a widow of a reasonable portion of her husband's estate for debts contracted for the thread and marriage ceremonies of her daughter's son was held binding on the reversioners, even though the daughter's son was not so indigent as to be dependent upon his grandmother (57 Mad. 772). An act supposed to conduce to the spiritual benefit of herself alone would not confer benefit on her husband and hence would not be supported as for a legal necessity (43 All. 463). A widow, who is not herself in

possession of the estate, but is merely recovering maintenance out of it, cannot claim to recover from the estate the expenses she has incurred by reason of a pilgrimage for the spiritual benefit of her husband, who was not the last holder of the property (*Ramabai v. Dattatraya*, 33 Bom. L. R. 1244).

Payment of barred debts left by her husband is a pious duty on the part of the widow and amounts to legal necessity. But a mother succeeding as heir to a son's estate cannot alienate the estate for payment of debts of her husband, unless charged upon the estate, though her son was under a pious obligation to pay them (43 All. 604).

Under Hindu law, no doubt, the marriage of a daughter would be a legal necessity justifying the alienation of property by a widow. A divorce, however, is against the policy of Hindu law, and there is no precedent which would justify the Court in holding that a divorce may be regarded as a legal necessity (30 Bom. L. R. 1145).

Burden of Proof. The principles enunciated in *Hunooman Persaud v. Mst. Babooee* as to what amounts to necessity, what is the duty of a person dealing with the manager of an infant heir, and the burden of proof where an alienation by such manager is in question, apply equally to cases of persons dealing with a Hindu widow or other limited heir.

To uphold an alienation by a widow of her deceased husband's estate where she is his heir, it must be shown—

- (1) that there was legal necessity, or
- (2) that the alienee, after reasonable enquiry, acted on the belief that it existed, or
- (3) that there was such consent of the next heirs of her husband as would raise a presumption, either of the existence of necessity, or of reasonable enquiry and honest belief as to its existence, or
- (4) that there was consent of the next heirs to an alienation capable of being supported as a surrender by her in favour of the next heirs.

Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate; but where the fourth alone is proved, then the alienation must be of the whole estate (*Devi Prasad v. Gopal*, 40 Cal. 721). For presumptions to be drawn when the transfer by the widow is challenged after long delay, *vide* A. I. R. 1942 All. 110.

Equities on setting aside alienation. (1) When an alienation is set aside, the reversioner may be required to pay the amount to the extent to which the estate has derived benefit. Where the purchase was to the knowledge of the reversioner and without any protest from him, or the purchaser, in good faith believing that he has acquired an absolute title in it, spends money in making any improvement, the Court may, on setting aside the sale, direct the reversioner to compensate the purchaser for the amount spent by him on such property, to the extent of the enhanced market value of the property. Under the Transfer of Property (Amendment) Act, 1929, Sec. 51 of the Act relating to improvements made by *bona fide* holders under defective title will now apply to transfers made by Hindu females holding a limited estate. This provision entitles the transferee to claim the market value of the improvements in case the transfer is set aside. (2) If the purchase money of a sale is intact, the Court may, on setting aside the sale, direct the return of the money.

§ 124. **Alienation by widow with consent of reversioners.** In the absence of proof of actual necessity or of reasonable inquiry by the alienee, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction, will be held to afford a *presumptive proof* of the existence of legal necessity, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one (*Rangaswami v. Nachiappa*, 46 I. A. 72). The power of validation by consent rests upon the principle that the consent of persons interested to oppose the transaction *evidences its propriety if not its actual necessity*. Again, if the consent of the whole body of reversioners is obtained, there would be no one who, at the time the estate passes to the reversioners, can impeach the transaction. "It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding" (*Ramgouda v. Bhausahab*, 54 I. A. 376). In certain cases, therefore, the consent of the nearest reversioner has a double aspect, not merely as raising a presumption of necessity, but also as raising an estoppel against the consenting reversioner. Hence, even when a single reversioner consents to an alienation, he will be taken to have *elected* to stand by the alienation, and will be estopped from questioning the alienation if he is the *actual* reversioner at the time of the widow's death (*Basappa v. Fakirappa*, 46 Bom. 293 ; 45 All 339, F. B. ; 52 Mad. 556,

F.B.). The son of a consenting reversioner will not be precluded, *unless he derived a benefit from the transaction* and the consent was given fraudulently or collusively (*Vinayak v. Govind*, 25 Bom. 129). Similarly, where the consenting reversioner was a paternal ancestor of the actual reversioner, it was held that the latter was not estopped (A. I. R. 1938 Mad. 433).

If, however, the actual reversioner is a person other than the consenting reversioner, he will not be precluded from questioning the alienation. The reason is that the alienation with the consent of a reversioner rests on the basis of *presumptive proof of necessity*, and the presumption may be rebutted by the person actually succeeding to the estate, if he is not himself precluded by consent (49 Bom. 117 ; A. I. R. 1901 Cal. 383). When the presumption is rebutted, there is no presumption that all or any items of the consideration for alienation were for justifiable necessity (55 All. 157). But if, *on evidence*, any amount of the sale consideration is found to be for legal necessity, the *actual* reversioner must, as a condition precedent to the declaratory decree prayed for, *viz.*, that the sale-deed executed by the widow is not binding on him, repay that amount to the vendee when the actual reversioner becomes entitled to the possession of the property on the death of the widow and consenting nearest reversioner (1933 All. L. J. 42).

The consent, in order to raise the presumption of necessity, must be (1) ordinarily of the whole body of the next reversioners, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible ; (2) no particular form is necessary, but it must be given with full knowledge of the circumstances and of the effect of the transaction, and with an intelligent intention to consent to such effect, mere attestation of a deed not being conclusive proof of such consent (*Sham Sunder v. Achhan Kumari*, 25, I. A. 183) ; but attestation coupled with other circumstances can amount to consent (A. I. R. 1925 All. 209) ; joining in the execution of the deed of alienation is unequivocal evidence of consent (44 All. 94) ; the consent need not be expressed by a registered instrument (40 Bom. L. R. 1270) ; (3) if the next reversioner is herself a female, the consent of the next male reversioner is necessary ; (4) the alienation consented to must be for value, for example, a sale or mortgage, but not a gift (46 I. A. 72.) But the deed, which purports to be a gift,

may be part of a whole transaction which is in effect a sale with the consent of the reversioner. Thus a gift of a part of the estate to the next reversioner followed by a sale by him of that part, when the two documents were so connected together as to form one transaction, was upheld as an alienation with the consent of the next reversioner (*Muhammad v. Darshan*, 50 All. 75). (5) The consent may be given even after the alienation, so as to ratify it (30 All. I, P. C.).

In *Basappa v. Fakirappa* (46 Bom. 292), the matter against the consenting reversioner was put on the ground of *estoppel*; in *Akkava v. Sayadkhan* (51 Bom. 475), the reversioner was held barred from questioning on the ground that he or she by joining in the sale deed had ratified or elected not to have it set aside. Where the reversioner, the daughter-in-law, had consented to the gift by the widow to the next reversioner, the daughter, on condition that the daughter should maintain both the widow and the daughter-in-law, it was held that the latter having received maintenance was precluded on the ground of election from challenging the gift (32 Bom. L. R. 705). In the case of an alienation by the widow, the reversioner's act in accepting a substantial benefit from the alienation amounts to an act showing his consent to the alienation and his election to treat it as valid and binding, so far as he is concerned (30 Bom. L. R. 1145). In *Bhausahab v. Ramgouda* (52 Bom. 1), the Privy Council held that a reversioner, who is a party to and is benefited by a transaction entered into by a Hindu female, is precluded from questioning any part of it, and his sons cannot set it aside, especially when he did not do so in his lifetime. In a recent case, the Bombay High Court held that, though the doctrine of estoppel cannot be applied in the case of a gift where no detriment is caused to the donee and the strict doctrine of election cannot be invoked in the case of a reversioner who has not benefited by the transaction, it is now settled that where a reversioner has either ratified the transaction after the death of the widow or has unequivocally manifested his intention to abide by the act of the widow, *e. g.*, by joining in the deed of the widow during her lifetime, he is personally debarred from resiling from it and impugning its validity (*Baburam v. Tukaram*, 33 Bom. L. R. 235). According to Oudh Chief Court, where there is no legal necessity for an alienation by the widow of the property constituting the widow's estate, consent by the presumptive reversioner amounts to nothing more than a promise without consideration to treat the alienation as valid at some future date. So such consent does not validate a transfer otherwise invalid and the consenting reversioner or one claiming through him is not bound by it (A. I. R. 1939 Oudh 145).

§ 125. Surrender of the estate by widow. * A widow

* State clearly the rules about the surrender by a Hindu widow

may surrender or relinquish (1) her *whole interest in the whole of the estate*, (2) in favour of the *next reversioner* or the whole body of persons constituting the next reversion, (3) provided it is a *bona fide* surrender, and *not a device to divide the estate* (*Sureshwar v. Maheshwari*, 48 Cal. 100, P.C.). A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can, so to speak, by a voluntary act operate her own effacement, and accelerate the interest of the nearest reversioner or reversioners. The test to determine the validity of a surrender by a Hindu widow is whether there is a *bona fide* and total renunciation of her right to hold the property by any voluntary act on her part which has the effect of effacing herself from the succession as completely as if she has died (A. I. R. 1937 Cal. 167).

(1) The surrender by a widow must be a surrender of her whole interest in the whole of the estate. The whole estate means the whole of such part of the original estate as is with the widow at the time of the surrender. Hence, if a deed of surrender is *bona fide* and effects a complete surrender of the widow's entire interest in her husband's estate as it exists at the date of the execution of the deed, the deed is valid even if prior to the execution of the deed the widow had made another alienation (A. I. R. 1940 All. 57). As the surrender operates as an effacement, which in other circumstances is effected by actual or civil death which opens the estate of her deceased husband to his next heirs at that date, there cannot be a widow who is partially effaced and partly not so. The widow cannot, therefore, make a valid surrender of a part of the estate, even though she relinquishes her whole interest in that portion (*Rangaswami v. Nachiappa*). The mere omission of a small item of property will not vitiate the surrender, when the part left out is one from the possession of which not only the widow but her husband also were kept out for a long

of her estate in her deceased husband's property, and distinguish a valid surrender from an alienation by a Hindu widow. (April, 1926.)

What is a valid surrender of her estate by a Hindu widow so as to bar the rights of the reversioners? (April, 1931.)

State the conditions of a valid surrender by a widow of her widow's estate. (April, 1932.)

What are the requirements of a valid surrender by a Hindu widow of the estate inherited by her? (Oct., 1940; 1941; April, 1943.)

time, and the widow was thus rightly under the impression that the item left out did not at all belong to her (A. I. R. 1937 Cal. 167). An honest omission, due to ignorance or oversight, of a very small portion of the estate does not affect the validity of a surrender, which, apart from it, is a *bona fide* transaction (40 Bom. L. R. 876). But it is not necessary that the surrender should be effected by a single transfer. What is material is that there should be *bona fide* and complete renunciation by the widow of her rights in the estate, and if the effect of several acts forming part of one transaction is such renunciation, it would be a valid surrender. But the widow may, by making a previous gift of the whole estate, put it out of her power to make a valid surrender (*Sakharam v. Thama*, 51 Bom. 1016).

The whole estate means only the estate held by inheritance from the last full owner and not any other estate held by the widow adversely, or as *stridhana*, or as heir to another person. A mother got her son's *watan* property by adverse possession and other property as heir to her son. She made a gift only of this latter property, inherited by her from her son, in favour of her daughters. It was *held*, that the gift was a valid surrender, as the *watan* property which she had retained, was not inherited by her as an heir, but was acquired by her by adverse possession, and therefore, she had divested herself of the whole of the property which came to her as heir of her son (*Anna v. Gojra*, 30 Bom. L. R. 867).

(2) Again, the surrender must be in favour of the whole body of next reversioners ; a surrender in favour of some of them, even though comprising the whole of her interest in the whole estate, cannot be validated as a surrender. A surrender to one of them for the benefit of all of them is not valid and cannot be equal to a surrender to all. Nor can a gift in favour of a remote, without the consent or acquiescence of the next, reversioner be validated as a surrender. Thus a gift in favour of daughters' sons, the daughters being then alive, who were not shown to have consented or acquiesced in the transaction, is not valid (*Narayan-swami v. Rama*, 32 Bom. L. R. 1564, P. C.). If the next reversioner be a female, taking a limited estate, the surrender is valid nevertheless. There is no difference between a surrender by a widow to a female reversioner, *e. g.*, a daughter in the Madras

Presidency, who takes an estate for life, and a surrender to the nearest male reversioner, who takes an absolute estate (*Vylta v. Narivada*, 57 Mad. 749, P. C.).

(3) Thirdly, a surrender must be *bona fide* in the sense that the widow retains no benefit either directly or indirectly, that is, there must be complete relinquishment. If, in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld, the transfer to the reversioner in such a case is really a device to divide the property between the lady and the reversioner (*Subralakshmi*, 58 Mad. 150). The widow cannot reserve any right or enter into any arrangement with the next reversioner so as to convert her life-estate into an absolute estate. Thus, where the entire body of reversioners executed a deed by which, in consideration of a grant of a certain portion of the property to them, they released their entire interest in the remainder of the estate in favour of the widow, empowering her to dispose of the said remainder as she liked, it was held that the transaction was a mere *device to divide* the estate between the widow and the reversioners, and hence was not a valid surrender. But, if the surrender is a *bona fide* one, in the sense as stated above, it is not a further condition that the motives operating on the mind of the widow must be of a religious or spiritual character. The validity of a surrender by a Hindu widow does not depend upon her motive (58 Mad. 150).

Gift with consent of next reversioner whether supportable as a valid surrender. The Calcutta High Court held that a gift of the *whole* estate to a *third party* with the consent of all the reversioners may be supported as a surrender, because such a transaction in effect amounts to two gifts, *viz.*, (1) a surrender in favour of the next reversioners, and (2) a gift by them to the third party (10 Cal. 1102). The same view is taken by the Madras High Court in a case where the gift was not to a total stranger but to one in the line of the reversionary heirs (daughter's sons), the gift by the widow being made with the consent of the daughter (mother of the donee), who was the next reversionary heir (42 Mad. 25). In *Yeshavanta v. Antu* (36 Bom. L. R. 671, dissenting from *Tukaram v. Yesu*, 32 Bom. L. R. 1463), the Bombay High Court has also taken the same view. A Hindu died leaving his widow and two daughters. One

of the daughters was married to the defendant No. 1. After the death of this daughter, the widow and the other surviving daughter made a gift of the whole property to the defendant No. 1. Subsequently, the widow adopted the plaintiff, who sued to set aside the alienation ; it was *held*, dismissing the suit, that the gift was valid as a surrender by the widow being of the whole estate and the next reversioner having joined in the transaction (*ibid*). Where, however, the widow gifted away the entire estate inherited by her from her husband, jointly to her minor daughter, who was the next reversioner, and her husband, it was held that the gift was invalid. Such a transaction cannot be regarded as a surrender by the widow and a simultaneous gift of a half portion by the daughter to her husband, as the latter, by reason of her minority, was incompetent to give consent to the gift (*Bala v. Baya*, 38 Bom. L. R. 1086).

Provision for maintenance. A widow, who surrenders her whole interest and is treated as regards her husband's estate as though she is civilly dead, is nevertheless, in fact, physically alive, and she remains entitled to maintenance out of her husband's estate. If, therefore, the deed of surrender merely provides that she is entitled to maintenance, it does no more than express what the law would allow, and, therefore, such a provision would not vitiate the surrender by rendering it a device to divide the estate. Where, therefore, a widow surrendered her deceased husband's estate to her daughter with a stipulation that the daughter should maintain the widow as long as she lived, it was *held*, that such a stipulation was unobjectionable and the surrender was valid (*Rama v. Dhondi*, 47 Bom. 238). There is nothing in law which prevents the surrendering female from taking a portion of the immoveable property or a lump sum at once for purposes of maintenance, provided it is not unreasonable. The maintenance need not be provided in the shape of a periodical pecuniary allowance. The maintenance, however, can be enjoyed by the surrendering female for her lifetime, and a stipulation that it should be paid to her heirs and successors is invalid (A. I. R. 1941 All. 41 ; A. I. R. 1941 Cal. 41.)

Effect of Surrender. * The principle on which the doctrine

* Elucidate the following : " The true doctrine of acceleration is no

of surrender is based is that it is the intervention of the widow that postpones the succession of the reversioner, and that, if she should disappear from the scene, she thereby anticipates for the reversioner the time of his succession. Thus the presumptive reversioner's expectancy to succeed becomes concrete and is accelerated. The basis of the doctrine of surrender is the effacement of the widow's interest, and its result is merely that the next heir of the husband (or the male from whom she has inherited the estate) steps into the succession in the widow's place (*Vytla v. Marivada*, 36 Bom. L. R. 563, P. C.). But the presumptive reversioner does not get an estate larger than what he would have obtained on the death of the widow, nor does he acquire a right to impeach proper alienations of the widow made before the date of surrender. Hence a female, who takes only a limited estate in property inherited, takes also a limited estate in the property surrendered to her.

Extent of self-effacement on surrender. Surrender amounts to complete effacement of this limited owner and she cannot sue after the surrender for any benefit which had accrued to the estate before her surrender. But the widow is not civilly dead for all purposes. (1) She continues to hold her *stridhana*; (2) she has a right of maintenance out of the estate which she has surrendered; (3) she may acquire other properties; (4) she may file suits and enter into contractual and other obligations; (5) she may succeed as heir to any other of her relatives, and even to the reversioner to whom the surrender was made; (6) she may retain any other estate, whether *stridhana* or limited estate, inherited by her from any person other than the one whose estate she had surrendered.

The birth or adoption of a preferable heir subsequent to a valid surrender does not vitiate the surrender or divest the estate of the surrenderee (52 Cal. 1018). Even after a surrender, the reversioner cannot question the widow's prior alienations during her lifetime, as the alienees are reasonably entitled to calculate that the alienations will hold good at least for her life. But as regards prior *improper* alienations, the right to challenge them on the widow's death vests in the surrenderee.

The term '*surrender*' is borrowed from the English law, where a surrender can be made by one having a particular estate, such as a life-estate, in favour of the person who has the reversion

more than the English doctrine of merger subject to the peculiar conditions and requirements of the joint Hindu family." (Oct., 1928.)

or remainder immediately expectant on the determination of that estate. The whole doctrine of surrender and consequent acceleration of the estate of the reversioner has no basis in Hindu Smritis, but has been evolved by Courts on general principles of jurisprudence.

Difference between surrender and alienation. (1) A surrender has to be made in favour of the nearest reversioner. An alienation may be made to any person. (2) A surrender is not valid, if consideration is received by the widow surrendering. An alienation is not valid unless made for consideration. (3) An alienation cannot be made even for consideration, if there is no legal necessity for it. The validity of a surrender does not depend upon the existence of a necessity. (4) An alienation supported by necessity is valid, whether it is of a part of the whole of the estate. A surrender to be valid must always be of the whole estate.

§ 126. **Widow's power of management.** * A widow is entitled to manage the estate inherited by her, but her power is, like that of the manager of an infant heir, a limited and qualified one, which can only be exercised *in case of necessity* or *for the benefit of the estate* (*Hunooman Persaud's case*; *Kameswar Prasad v. Run Bahadur*, 8 I. A. 8). She is an absolute master of the income and may spend it at her pleasure. As regards investment, she may choose the investment which is more advantageous to herself at the time of making the investment.

The widow can grant leases of properties forming part of the estate. But she cannot grant permanent or long term leases, unless they are justified by legal necessity or are for the benefit of the estate, or the reversioners have given their consent. A permanent lease is not justified merely because it would improve the land, for the benefit contemplated in the expression '*benefit of the estate*' is by a protective act.

The widow can make *reasonable compromises*. It has been established that a compromise entered into *bona fide* by a Hindu widow, if it is reasonable and prudent, and in the interest of the estate, is binding on the reversion (29 Bom. L. R. 1346). If a reversioner is a party to a compromise and benefits by the transaction, he will be precluded from questioning the alienation. But even though the reversioners are not a party to the transaction,

* Briefly state the powers of management possessed by a Hindu over property inherited by her from her husband. (Oct., 1926.)

a compromise or a move towards a compromise would be binding on them, if it is in the nature of a *bona fide* settlement of disputes in respect of the estate between the widow and a person *who has honest claims against it* (*Ramsurran Prasad v. Shyam Kumari*, 42 I. A. 342). It is competent to a Hindu female holding a limited interest in the estate she holds as the heir of the last male owner to enter into a family settlement with the reversioners to the estate. The arrangement, however, must be a *bona fide* one in settlement of family disputes, and must not be a device to divide the estate between her and the reversioners to defraud the actual reversioner when succession opens (A. I. R. 1938 Mad. 364). But where it has not been shown that a party to an arrangement had any competing title of his own in respect of the properties in dispute, there can be no valid family settlement between the parties which would bind the reversion (A. I. R. 1942 P. C. 54).

She is not bound to pay the expenses of necessary acts from the income, and may throw the burden of paying them on the *corpus*. She is not bound in the first instance to raise the money by a mortgage, if that would be more prejudicial to her than a sale, or to raise the money on her personal security. She is also not bound to sell just the portion sufficient to meet the necessity. "A widow, like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to the expectant heirs" (*Hardi v. Bhagvan*, 18 Bom. 534).

A widow, however, who commits waste, may be deprived of the power of management. A Hindu widow can waste neither movable, nor immovable, property. Where a widow or other limited heir is in possession of the property inherited by her, she is considered to commit "waste" only when she does an act which constitutes danger to the property, or in other words, which diminishes the value of the estate, or when her act is injurious to the reversioners, *i. e.*, when the title of those next in succession is endangered. In such cases, the next reversioners can bring a suit to restrain such waste and can also ask the Court to remove the widow from possession.

§ 127. **Unsecured debts.** If a widow, instead of alienating her husband's property for a legal necessity, incurs a debt, the question arises whether it would be binding on the reversioners after her death. If the debt is secured by a charge or a mortgage

on the property, or if a decree is fairly and properly obtained against her in her lifetime on the debt (*vide* below), there is no doubt as to its binding nature on the property in the hands of the reversioners after the widow's death. A difference of opinion exists, however, with regard to unsecured debts of the widow even though they may be legally justifiable on the ground of necessity. According to the Bombay, Calcutta and Nagpur High Courts, all unsecured debts, if contracted by a widow as representing the estate and incurred for a legal necessity are binding on the estate in the hands of the reversioner after the widow's death in the absence of proof of an agreement confining the liability to the widow personally (*Dhondo v. Mishrilal*, 38 Bom. L. R. 6, F. B.; 6 Cal. 36; 10 Cal. 823; I. L. R. 1939 Nag. 347). As stated by the Full Bench in *Dhondo v. Mishrilal*, "We are of opinion that there is no warrant in Hindu law for making a distinction between secured and unsecured debts provided they are both for legal necessity... Where the widow incurs the necessary liability in her character as such, *i. e.*, as representing the husband's estate, the intention of binding the estate as opposed to binding herself alone is to be inferred, because ... the reversioner's obligation depends on the purpose of the debt rather than on the intention of the parties contracting it. Definite evidence would be necessary to prove an agreement confining the liability to the widow's personal capacity." The trend of the Madras decisions seems to be that the question must be decided by the intention of the contracting parties to be gathered from the statements in the deed, if any, or from the surrounding circumstances. Where the intention is that the estate was to be bound, it would remain liable in the hands of the reversioners although it was not charged, and it would be otherwise where it was intended to bind the widow personally only (33 Mad. 494; 34 Mad. 188; 35 Mad. 108). The earlier Allahabad decisions seem to lay down that where the creditor does not obtain a charge on the property but only accepts the personal credit of the widow, his debt does not bind the estate after the widow's death (19 All. 300; 30 All. 394). But in a recent case, a Division Bench has held that the question is one of fact. If in the circumstances of a particular case a person advancing money in order to discharge a liability against the estate is led to believe and quite reasonably concludes that the widow is acting on behalf of the estate, the estate would be bound; while,

on the other hand, if it appears that the advance was made personally to the widow and there was no suggestion that she was borrowing the money on behalf of the estate, the widow alone would be bound and the creditor would have no remedy against the estate (A. I. R. 1942 All. 189). The difference, thus, is that according to the Madras and the Allahabad High Courts, the creditor must not only prove that the debt was contracted for a legal necessity but also that the intention of the parties was that the estate would be liable, in the case of the other Courts mentioned above, if legal necessity is proved, the liability of the estate would be presumed, and the burden of rebutting it would be on the contending reversioner. •

About one class of unsecured debts, however, there seems to be general agreement that they are binding on the estate in the hands of the reversioners, and those debts are what are called "trade debts," that is, debts ordinarily incurred by a widow in the management of a business concern inherited by her (*Sakrabai v. Maganlal*, 26 Bom. 206, F. B.; 36 Bom. L. R. 844; 42 All. 109). That proceeds upon the basis that when she incurs debts, the presumption is that the creditor looks to the credit of the assets of the business and not to her personal credit, and, therefore, although no specific charge is created, the credit of the business is impliedly pledged.

§ 128. Widow as representative of the estate. A widow or other limited owner fully represents the estate (*Shivagunga's case*). This gives rise to some important legal consequences :—

(1) Decree against widow. * The widow represents the whole estate in legal proceedings relating thereto, within the meaning of Expl. 6, Sec. 11 of the Civil Pro. Code. Hence a decree passed against her would be binding not only upon her but upon the whole reversion, if (i) the suit in which it was passed was in respect of *a debt or other transaction binding upon the estate*, (ii) the decree was passed against her as *representing the estate*, and not in her personal capacity, and (iii) there was a *fair trial* of the right in the suit (*Katama Natchiar v. Rajah of Shivagunga*; *Mummi Bibi v. Triloki Nath*, 33 Bom. L. R. 979, P. C.). The

* How far are reversionary heirs bound by decree obtained against a Hindu widow in possession of her husband's estate? (Oct., 1926.)

test is whether the widow was sued as a representative of the estate or in her personal capacity (A. I. R. 1938 All. 492). It is not necessary that the suit should have been contested to the end. What is material is that there should be *no fraud or collusion* between the parties, and then even a consent decree would bind the reversioners, provided the compromise was entered into by the widow *bona fide* for the benefit of the estate and not for her personal benefit (*Ramsumrun v. Shyam Kumari*, 49 I. A. 342). An *ex parte* decree, unless there is anything special which would suggest that it was not fairly and properly obtained, would be binding on the reversioners (47 All. 490).

But a litigation by the widow in the enjoyment of a life-estate, whether she be the plaintiff or defendant, will not represent the estate fully so as to give rise to the bar of *res judicata* against the reversioners, if such litigation is qualified and personal to the widow, or has arisen out of acts of her own affecting the estate during her own lifetime therein (42 Bom. 69). Where, in the previous suit, a daughter of the deceased had contended that the woman claiming to be the widow of the deceased was not married to the deceased and the Court had held that the marriage of the woman with the deceased was not proved, it was *held* that the woman could not be regarded as representing the estate, and the judgment was a judgment *inter partes* only and did not bar the subsequent suit by the daughter of the woman claiming that the woman was legally married to the deceased, and, therefore, she was a legitimate daughter, and being an unmarried daughter she was a preferable heir to the other daughter by the step-mother (35 Bom. L. R. 118).

(2) **Acknowledgment of debt by widow.** The widow *can make a valid acknowledgment, or a payment of interest or part payment of the principal* so as to extend the period of limitation of a *subsisting* debt or liability (*vide*, the amended Sec. 21 of the Limitation Act), but not in the case of a time-barred debt.

(3) **Adverse possession against widow.** As the widow represents the estate, the question arises whether adverse possession against the widow bars the reversioners. It has been recently held by the Privy Council that mere adverse possession against the widow which bars her right does not bar the reversioners. The reversioners can sue the trespasser for possession within 12

years after the death of the widow, as the case is governed by Art. 141 of the Limitation Act (*Jaggo Bai v. Utsava Lal*, 31 Bom. L. R. 891). Where, however, a decree has been obtained against the widow, or there has been any other act in the law in the lifetime of the widow destroying the heirs' interest, the reversioners' right would be barred (*Vaithialinga v. Srirangnath*, 28 Bom. L. R. 173). The Full Bench of the Allahabad High Court also took the same view, and held that where a widow has entered into possession as a Hindu widow and has either voluntarily parted with possession or been dispossessed against her consent, a suit by the reversioners after her death, brought within 12 years of the death of the widow, is not barred by limitation (*Bankilal v. Ragnath Sahai*, A. I. R. 1928 All. 561). But in a recent Calcutta case, Page, J., observed that there is no difference between the loss of reversioner's right by adverse *possession* against a widow and the loss of such right by adverse *decree* against her, and in both the cases, the question should be decided whether the widow was acting in the case as representing the estate or in her personal capacity (A. I. R. 1928 Cal. 670). But this case was dissented from in A. I. R. 1929 Cal. 93, where it was held that no length of possession adverse to the widow would bar the reversioner, who have 12 years, reckoned from the widow's death, to sue. But adverse possession starting in the lifetime of the last male owner will continue to run during the widow's possession of the estate (A. I. R 1925 Oudh 729).

§ 129. **Reversioners.** These are the male or female heirs of the last full owner who would be entitled to succeed to the estate on the death of a widow or other limited owner, if they be then living. Those persons who would be entitled to succeed if the woman were to die at the moment are called the *next or presumptive* reversioners, while those who would come after them are called the *remote or contingent* reversioners.

Where there are several reversioners entitled successively to succeed to an estate held for life by a widow or other limited owner, no one of such reversioners claims through or derives his title from another reversioner, even if that other happens to be his father, but each reversioner derives his title from the last full owner (*Rangaswami v. Nachiappa*, 46 I. A. 72). There is no privity of estate between one reversioner and another as such,

and consequently, an act or omission by one reversioner, except so far as he can consent to an alienation by a limited owner, cannot bind other reversioners, even though they may be his heirs.

§ 130. **Nature of their interest.** * So long as the limited owner is alive, no one has any *vested* interest in the property. "None of these reversioners, speaking strictly, can be said individually to possess any certain or tangible interest in the reversion ; for the person who will get it is only he who shall *actually survive* the qualified proprietor and who shall occupy at her death the position of heir to the last full owner, and who that will be it is, of course, impossible to say." Hence a Hindu reversioner has no right or interest *in praesenti* in the property which the female holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise ; until then it is an interest *expectant* on the death of a limited owner, a *bare chance of succession* or a *spes successionis* within the meaning of Sec. 6 of the Transfer of Property Act (*Amrit Narayan v. Gayasingh*, 45 Cal. 590). It is incapable of being inherited, or being renounced, or being attached in execution of a decree. No valid transfer even for a consideration can be effected in respect of it. But if the transfer is part and parcel of a family settlement it would not necessarily be invalid ; such a transfer or relinquishment of a prospective right as part of a family settlement stands in an entirely different position from the transfer of a bare *spes successionis* (A. I. R. 1939 All. 689, F. B.).

§ 131. **Rights of reversioners.** † Though the next or presumptive reversioner has no interest higher than a *hope of succession*, he has got a right to have the estate kept free from danger during its enjoyment by the limited owner, and may, therefore, sue to restrain such owner from committing waste or injuring the property. Though ordinarily a reversioner is not entitled to bring a suit to impugn the transactions by the last male holder during the lifetime of the widow, still, in very exceptional

* Comment briefly on the following : "Where an estate is held by a female no one has any vested interest in succession." (March, 1923.)

† By whom and under what circumstances can an alienation by a Hindu widow be impeached during her life-time? (April, 1925.)

Discuss the rights of reversioners with respect to unauthorised acts by a Hindu widow. (Oct., 1941.)

circumstances, where it is proved that the reversion is likely to be jeopardised by collusion or other act of the widow, dethroning or imperilling the reversionary right, the reversioner would be entitled to bring a suit for declaration or any other appropriate remedy (*Shankarbai v. Bai Shiv*, 32 Bom. L. R. 1013). Such a right is based on the danger common to all the reversioners, and the right is recognised on the ground of necessity, because, otherwise, evidence regarding the true character of the alienation might disappear and not be available when required.

The next reversioner has, therefore, the following rights during the lifetime of the limited owner :

(1) He may bring a suit to restrain her by an injunction from making an improper alienation.

(2) He may bring a suit for a declaration that any alienation made by her is not valid beyond her lifetime, or

(3) that an alleged adoption prejudicing the reversion is invalid or never in fact took place.

(4) He may oppose the grant of probate to the limited owner, if such grant is prejudicial to the reversion.

(5) Where the widow claims the property as her absolute property, the next reversioner can file a suit for a declaration that she is entitled only to a widow's estate in the property. If the claim of the female as absolute owner of the property was against the last full owner also, it will bar the presumptive or actual reversioners after 12 years from the date of adverse possession, and no suit will lie for a declaration or for possession after her death (42 All. 152).

(6) He may file a suit for a declaration against the widow's trespasser or those who claim adversely to the widow that their adverse possession does not bind the reversioner.

When, however, the property is neither alienated nor charged, nor is there any allegation of waste, there is no cause of action for a declaration (4 Lah. 116). A reversioner has no right to sue for possession which right only matures on the death of the widow leaving him as the actual reversioner, nor is it competent to the Court to make a declaration that would create an interest that did not exist (45 All. 179). A reversioner has no right to maintain a suit for the administration of the estate (42 Bom. L. R. 876).

The granting of a merely declaratory decree or of an injunction is discretionary, and the Court will not grant the relief, unless the act complained of constitutes danger to the reversion.

A declaratory suit must be brought within 12 years from the date of alienation sought to be declared not binding on the estate. But a reversioner is not bound to sue during the life-time of the limited owner, and his right to sue for *possession* on the death of such owner would not be affected by his failure to do so (48 Bom. 654). The reason is that a suit for possession can only be brought by the reversioner on the death of the limited owner, and then his right would not be barred for 12 years in the case of immovables and 6 years in the case of movables from the date of her death.

A reversioner is, however, not entitled to sue for a declaration that he is the next reversioner, because this can be determined only after the death of the limited owner. The declaration, therefore, is futile and must be refused (35 Cal. 777 ; A. I. R. 1938 All. 546). As the actual succession will depend upon the state of things existing at the time when the widow dies, it is impossible to determine before the widow's death who would be the next reversionary heir of the deceased full proprietor (50 All 678). But a declaration that a person is a reversionary heir can be made if it is only incidental to the grant of any other relief. As a will can operate only on the death of the person making it, the mere fact that the limited heir has made a will purporting to dispose of the property does not give the reversioner a right to have it declared invalid.

A suit for a declaratory decree is a *representative suit* on behalf of all the reversioners. There is only one cause of action based on the danger to the inheritance common to all the reversioners. Hence a new cause of action does not arise on the subsequent birth of a reversioner, and such a reversioner would be barred if the reversioners existing at the date of the alienation are barred at the time. But a minor reversioner, *existing* at the date of the alienation sought to be impeached, can take the benefit of Sec. 6 of the Limitation Act.

A decree obtained in a suit by the presumptive reversioner against the alienee would operate as *res judicata* in any subsequent suit to contest the same alienation. But a reversioner, who *actually*

succeeds to the estate on the death of the limited owner, would not be bound by a decree obtained *by fraud or collusion against the presumptive reversioner*, nor are suits to contest other alienations barred (47 All. 883).

It is incumbent on the plaintiff seeking to succeed to the property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that, to the best of his knowledge, there is no nearer heir (49 All. 779.)

§ 132. When can remote reversioner sue. The general rule is that only the *presumptive* reversioner, that is, the person who would succeed if the widow were to die at the moment, can sue for the declaration or injunction as stated above. There are, however, cases where the next presumptive reversioner can sue even if the presumptive reversioner is alive. These cases are, where the nearer reversioner (1) is in collusion with the widow, or (2) has concurred in the alienation, or (3) has precluded himself from suing by his own act or conduct, or (4) refuses without sufficient cause to sue (6 Cal. 764, P.C.), or (5) is from poverty not in a position to sue. (6) Where the next reversioner is *a female*, the Madras, Calcutta and Patna decisions lay down that the male reversioner next in succession to the female can sue. The Allahabad High Court does not recognise this exception (I. L. R. 1940 All. 416). The remote reversioner must specifically allege the ground entitling him to sue in the presence of a nearer reversioner (49 All. 815). When the nearest reversioner is a minor, a more distant reversioner cannot sue except as the minor's next friend. Even apart from the circumstances mentioned above, the Court in its discretion may not dismiss the suit of a remoter reversioner but may well allow it to go on after requiring the nearest reversioner to be made a party to the suit (A. I. R. 1937 Mad. 699, F. B.).

§ 133. Adverse possession by widow. A widow, claiming to possess not as a Hindu widow, but under an independent and adverse title, would acquire the property as her stridhana property. The reversioners would be barred by such hostile possession by her of her husband's estate for twelve years (*Lachhan Kunwar v. Manorath Ram*, 22 Cal. 445 ; A. I. R. 1940 Oudh 63). If, however, a widow has a widow's estate, and *if possessing as a widow* she possesses adversely to any one as to certain

property, she does not acquire that property as *stridhana*, but makes it good to her husband's estate (*Lajwanti v. Sofa Chand*, 51 I. A. 171). Such property would form an accretion to the estate, in which she takes no more than a widow's estate and which descends on her death to her husband's heirs.

Chapter XIV.

DEBTS.

§ 134. *Nature of liability.* The liability of a Hindu to pay the debts of another arises under Hindu law from three sources, *viz.*, (1) the *religious duty* of discharging the debtor from the sin of his debts; (2) the *moral duty* of paying a debt contracted by one whose assets have passed into the possession of another, and (3) the *legal duty* of paying a debt contracted by one person as an agent, express or implied, of another (Mayne).

The religious duty exists in the case of a son, grandson and great-grandson. A *father* is not under a religious obligation to pay the debts of his son, and hence, is not liable unless the son has left his self-acquired property to him (*Udaram v. Ranu*, 11 Bom. H. C. 76). A *husband* is not liable for the debts of his wife, unless they are contracted under his express authority or under circumstances of such pressing necessity that his authority may be implied, or he has ratified her transactions without previous authority, or she is entrusted with the management of a business. A *widow* is not bound to pay the debts of her husband, unless she has succeeded as his heir, or has promised to pay them, or was a joint-contractor with him.

Under Hindu law, the liability of a son or grandson arose even if he received no assets or property from the father. But this rule was considered inequitable and was not followed in any part of British India, except the Bombay Presidency, till the law there also was altered and brought in a line with the other provinces by the Bombay Hindu Heirs' Relief Act, 1866. While the British Courts have curtailed the liability in this respect, they have extended it in another direction. Under pure Hindu law, the liability of a son to pay his father's debts arose for the first time

after the death of the father, while under the law as it is administered now, the son's liability exists even during the lifetime of the father (*Brij Narain's case*).

§ 135. Classification of the subject. The subject of debts under the Mitakshara law may be treated under three heads ; (1) liability of separate property ; (2) liability of undivided coparcenary interest ; and (3) special liability of the son, which term includes grandson and great-grandson (*Masit Ullah v. Damodar*, 53 I. A. 204).

§ 136. Liability of separate property. The separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death in the hands of his representatives. The heir is *legally* bound to pay the debts of the deceased. The liability, however, is limited to the extent of the assets received from the deceased, and is *not personal* even if the heir be a son of the deceased. Hence the separate property of an heir is not liable for the debts of the deceased. *If, however, the heir disposes of the assets before the payment of debts, the creditor can hold the heir personally liable.* The son of a Hindu, where there has been no executor or administrator, in law represents the estate of the father and is, therefore, his legal representative. Hence, where there is an allegation that the estate of the father is in the hands of the son, the son is liable to have the decree passed against him for the father's debts, to be recovered only out of the assets come to his hands and not duly accounted for (42 Bom. L. R. 1066, F. B.).

The creditor cannot *follow* the assets in the hands of the alienee from the heir, if the alienation is in good faith and for consideration. His remedy is to proceed against the separate property of the heir.

In considering the liability of an heir, the question of legality or illegality of debts does not fall to be considered, and all debts must be paid so far as the assets go, provided they are not time-barred.

§ 137. Liability of undivided coparcenary interest. Except in the case of debts of the father or manager, one coparcener's interest will not be liable for the debts of another, nor is a coparcener, who takes by survivorship, liable to pay the debts of

a deceased coparcener. Thus a coparcener is not liable for the debts of his brother or uncle, unless the latter happens to be the manager *and* the debt was contracted for a family purpose.

A coparcener's undivided interest would be liable for the payment of *his personal* debts during *his lifetime*, but except in provinces, such as Bombay or Madras, it can be taken only in execution of a decree against him. After *his death*, the interest ceases to be his and passes to the surviving coparceners. Their right of survivorship can be defeated only if it has been *attached in his lifetime*, though it may not have been sold in his lifetime. *If the creditor has not attached the interest of the debtor-coparcener during the latter's lifetime, he can have no remedy against it.* The Bombay High Court has held that even an attachment *before* judgment *not followed by a decree in the lifetime* of the debtor, does not defeat the right of the survivors (*Subrao v. Mahadevi*, 38 Bom. 105). In the case, however, of a coparcenary consisting of a father and sons, the entire coparcenary property, including the sons' interest therein, is liable for the debts of the father, even though there was no attachment during the lifetime of the father.

Thus the undivided coparcenary interest will be liable (1) in the lifetime of a coparcener in execution of a decree, (2) to the extent of a mortgage, in those provinces where a private alienation is allowed, (3) after his death, if it was attached in his lifetime, (4) in the case of a father, even if not attached in his lifetime, (5) son's interest for payment of father's debts which are not immoral, and (6) for the payment of family debts properly incurred by a manager.

§ 138. **Special liability of sons.** The Hindu law imposes upon the son, grandson and great-grandson the duty of paying *out of the family assets* the debts of the ancestor from whom they have inherited the property, provided the debts have not been incurred for an immoral or illegal purpose, or are not barred by limitation (*Girdharee Lall v. Kantoo Lall*, 1 I. A. 321). This is the doctrine of pious obligation of sons to discharge the personal debts of the father, which is peculiar to Hindu law. The basis of the pious obligation rule is the benefit which will accrue to the soul of the father by the discharge of his earthly obligations (A. I. R. 1942 Mad. 183, F. B.). "The whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which, in my

opinion, make it a working rule which in its actual application is neither inconvenient nor unjust" (*per* Coutts Trotter, C. J., in 49 Mad. 211 at p. 213).

§ 139. Nature of son's liability. * (1) The liability is *not personal*. It is limited only to the son's interest in the coparcenary property (13 Pat. 7).

(2) The liability is limited only to sons who are joint with the father. The separated sons are not liable for debts incurred by the father *after* partition. A separated son would be liable for a *pre-partition* debt, but only to the extent of the share he has obtained on the partition. The creditor, however, must obtain a separate decree against the son, if he has obtained a decree against the father alone. He cannot, as in the case of an undivided son, proceed against the son's interest in execution of a decree against the father alone. It is only when the partition is fraudulent, as where it does not make provision for the father's debts, that he can have this right (*Annabhat v. Shivappa*, 52 Bom. 376). The same principle would apply in case a partition suit is pending at the time, as the mere institution of the suit puts an end to the joint status (*Baluswami Ayyar, In re.*, 51 Mad. 417).

(3) The liability of the son subsists so long as the liability of the father subsists. The pious obligation to discharge lawful debts of the father ceases on the debts being time-barred as against the father.

(4) The liability exists even during the life-time of the father (*Brij Narain's case*).

(5) The liability of the grandson and great-grandson is also

* Discuss the son's liability for his father's debts during the latter's lifetime as well as after the latter's death. (Oct., 1925.)

Discuss the liability of a son to pay his father's debts under Hindu law. (April, 1925.)

How far joint family property is liable in the hands of the descendants to pay the debts of their ancestors? (April 1931.)

How far is a son bound to pay his father's debts? Can a suit be filed against the son when the father is alive? Can a decree against the father be executed against the son after partition? (Oct., 1931.)

Distinguish between the liability of a Hindu son to pay his father's debts out of property inherited from the father and out of the joint family property. (Oct., 1932.)

State the nature and extent of the liability of a Hindu son to pay his father's debts. (Oct., 1941.)

State the nature and extent of a Hindu grandson's liability for the payment of debts of his grandfather. (April, 1943.)

similar to that of the son (*Masit Ullah v. Damodar*, 53 I. A. 204).

(6) The liability extends to the payment of interest subject to the rule of *Damdapat* wherever it applies (*vide infra*.)

The liability is not affected by the fact that the joint family also comprises members other than the father and his sons ; and the sons' liability based on the pious obligation does not become unenforceable against the joint family property if there happen to be coparceners other than the sons and their descendants, like uncles, cousins, *etc.* (57 All. 176, F. B.) Again the liability exists irrespective of the fact whether the father is or is not the manager of the joint family (55 All. 283 ; 57 Mad. 190 ; 15 Lah. 50).

(7) The liability is not joint or joint and several with the ancestor. It does not arise from contract as in the case of the father, but from the obligation of religion and piety imposed upon the sons under the Hindu law to discharge those debts of the father which are not immoral.

(8) The creditor can sue (a) *both the father and sons*, and enforce the decree against the *entire* coparcenary property, or (b) * *the father alone*, and take in execution of the decree the *entire* family property *including the sons' interest* (Sec. 53, the Civil Procedure Code), or (c) *the sons alone* if the father is dead. *The creditor can never sue the sons alone during the life-time of the father.* "Whatever may have been the law on the point prior to the introduction of Secs. 50 to 53 in the Code of Civil Procedure, it is now clear that even if a creditor obtains a decree against the father and the father dies before the decree is executed, the decree can be executed under Sec. 53 of the Code of Civil Procedure by attachment and sale of the entire joint property in the hands of his sons, and the ancestral property in the hands of the sons is to be deemed to be the property of the deceased, which had come to the hands of the sons as the legal representatives of the father" (*per Shingne, J. in Shankar v. Premchand*, 32 Bom. L. R. 919).

Where a decree is obtained against a Hindu father, the sons not being parties to the suit, the decree can be executed against the sons to the extent of the family property in their hands. But

* How far is a Hindu son affected by suits and execution proceedings exclusively conducted against the father? (April, 1922.)

where a decree is obtained against a Hindu father *and* his sons, the Court should restrict the decree, so far as the sons are concerned, to their interest in the family property; and where it is not so restricted, it can be executed against the property of the sons, whatever the nature of it, and against them personally (34 Bom. L. R. 941).

(9) There is one cause of action both against the father and the son, and the period begins to run in both the cases from the same time, *viz.*, the time when the debt becomes due and payable. The period of limitation against the father is 3 years in the case of unsecured debts and 12 years in the case of secured debts. Against the son as the liability arises from the religious duty and not from the contract as in the case of the father, the period is 6 years under the residuary Article 120 of the Limitation Act. The period is the same, *i.e.*, 6 years, whether the debt is secured or unsecured, because a secured debt cannot as such bind the son, when it is only a personal debt of the father. A mortgage or other charge upon the coparcenary property created by the father can bind the sons only when it is created for a legal necessity or for an antecedent debt not tainted with immorality. Where it is not so created, the mortgage is not binding on the son's interest as a mortgage, but as a *simple money debt*. According to the Madras High Court, the suit against the sons is also governed by the same article which governs a suit against the father, and must be brought within 3 years after the debt becomes due and payable.

(10) As the son's liability extends to paying only moral debts, they can object either (a) that there is no debt at all, or (b) that it is contracted for an immoral or illegal purpose. When they want to set aside a sale in execution of a decree, *in case the purchaser is a stranger to the proceedings of the suit for debt*, they must, in addition to proving the immorality of the debt, prove that the purchaser had notice that it was so contracted (*Suraj Bansi Koer v. Sheo Prasad*, 5 Cal. 148). The sons can raise these objections either in another suit, or in execution proceedings in the same way as if they were parties to the suit. If, however, the sons are parties to the suit, they cannot bring a fresh suit for contesting the *factum* or legality of the debt.

(11) No priority of payment out of joint family property exists in favour of the creditors of the father as against the credi-

tors of the son (*Chockalingam v. Official Assignee, Madras*, 45 Bom. L. R. 563, P. C.).

After a review of the decisions on the question of the son's pious obligation to pay the father's debts with special reference to the rights of the creditor of the father, Mr. Justice Lokur has laid down the following seven propositions :—

(1) Under the Mitakshara law, a Hindu son is under a pious obligation to pay his father's debt (not immoral or illegal) incurred when they were joint, and this obligation continues even after a partition between them, but is limited to the extent of his share in the joint family property.

(2) The son is not liable for a debt contracted by the father after partition.

(3) A decree against the father alone, passed when he was joint with the son, is binding on the son even after partition, though it is open to him to impeach it, either in execution proceedings or in a separate suit, on the ground that the debt for which the decree was passed was incurred for immoral or illegal purposes.

(4) So long as the father and the son are joint, such decree may be executed against the father alone and the entire joint family property including the son's share may be attached and sold for the satisfaction of the decree, subject to the son's right to oppose the attachment and sale or have them set aside on the aforesaid ground.

(5) If such decree is to be executed after the son has separated from his father, the son must be made a party to the execution proceedings, if his separated share is to be proceeded against. Otherwise its sale will not be binding on the son.

(6) A decree passed after partition against the father alone for his pre-partition debts (though not immoral or illegal) is not binding on the separated son. After partition, a decree must be obtained against the son, if his separated share is to be held liable.

(7) To obtain such a decree, the creditor must either join the son as a party to the suit against the father, or, if he has already obtained a decree against the father alone after the partition, he must file a separate suit against the son on the original debt, if it be in time, or sue for a declaration that the son's separated share in the joint family property is liable to be attached and sold in execution of the decree against the father for the satisfaction of the entire decretal amount or such portion of it as may be found binding on the son.

The first six propositions were laid down in *Surajmal Deoram v. Motiram Kalu*, (1939) 41 Bom. L. R. 1177, to which the seventh was added in *Ramchandra v. Annaji*, (1943) 45 Bom. L. R. 1037. According to the Full Bench decision of the Madras High Court in *Venkatanarayana v. Somaraju*, A. I. R. 1937 Mad. 610, the son cannot plead in execution that a partition has taken place between him and his father after the date of the suit against the father but before the decree, and

the decree can be executed against the joint family property in the hands of the son on the death of the father. In a recent Full Bench decision, by a majority, the Lahore High Court has held that a Hindu son, in a suit to avoid the liability of the joint family property in his hands, in execution of a mortgage or a simple money decree obtained against his father, can go behind the decree so as to challenge the existence of the debt on which the decree is passed. Neither the theory of pious obligation nor the principle of *res judicata* bars the son from challenging the existence of the debt on which the decree is based (A. I. R. 1944 Lah. 220).

Son's liability after partition. Even after a *bona fide* partition, the son is liable for the debts of the father, other than those contracted for an illegal or immoral purpose, and irrespective of the fact whether the father is alive or dead (52 Bom. 376 ; 14 Pat. 732). The liability of the sons which arises before a partition between them and their father, and the corresponding right of a creditor to recover his money from them cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not a party (51 All. 932).

§ 140. Nature of father's right to alienate. ¹ The father can alienate the whole coparcenary property for payment of his personal debts, provided they are antecedent *and* are not contracted for an immoral or illegal purpose (*Girdhar Lall v. Kantoo Lall*, 1 I. A. 321). Such an alienation would bind the interest of the sons, irrespective of the fact whether they have consented or not, or whether the father is or is not the manager of the joint family, or whether the joint family is or is not composed of persons other than the father and sons (1933 All. L. J. 550). The question of legal necessity does not fall to be considered. This right of the ancestor is in addition to his ordinary right as a manager to charge or alienate the coparcenary property in case of a valid necessity.

The question whether a debt is antecedent or not arises when the alienation is made by the father. It is the privilege of the father alone to burden the family estate by an alienation, for discharging an antecedent debt, which debt must be his own. A manager of the family, who is not the father, cannot bind the estate merely by discharging a pre-existing debt of the family (*Brij Narain's case*). Where the uncles of the plaintiff, who

* Indicate clearly the father's power under Hindu law to alienate joint family property for his own personal debts not incurred for the benefit of the family. (Oct., 1926.)

professed to act on behalf of the family, executed a mortgage to pay off two mortgages executed by the grandfather and father of the plaintiff, it was *held* that the uncles could not create a valid mortgage binding on the estate simply because there existed a debt incurred by the grandfather and father of the plaintiff, and the uncles could bind the estate only by proving that the mortgages executed by the grandfather and father of the plaintiff were for legal necessity (*Chiranjil Lal*, 55 All. 370, F. B.). Where the manager borrows money on pro-notes executed by him alone for purposes which are not for benefit or necessity of the joint family, he is not entitled to mortgage the family property for the discharge of such a personal liability of his (A. I. R. 1939 All. 486.)

In the leading case of *Brij Narain v. Mangala Prasad* (51 I. A. 129), the Privy Council laid down the following five propositions :—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity.

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of the debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, the debt must be truly independent of, and not part of, the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead.

The word "debt" in rule (2) covers all forms of debts, including secured debts (45 Bom. L. R. 821).

§ 141. What is an antecedent debt. * An *antecedent debt* means a debt antecedent in fact as well as in time, that is to say, the debt must be truly independent of, and not part of, the transaction impeached. A debt which is for the first time incurred at the time of the sale or mortgage, that is, which is presently incurred, is not an *antecedent debt*. An *antecedent debt* must have existed prior to and independently of such a sale or

* Explain antecedent debt. (Oct., 1928 ; 1940 ; April, 1932.)

mortgage. But the two debts need not be absolutely independent of each other, or wholly unconnected with each other. All that is necessary is that the previous debt, in order to be an antecedent debt, should be truly independent and not part of the subsequent transaction. The two deeds must not be part and parcel of the same transaction, but *they must be separate and distinct not only in point of time but in reality*. There must be dissociation in time as well as in fact. Thus where a previous mortgage deed is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of "antecedent debt," so as to be binding on the sons, unless they can establish immorality or illegality. If, at the time when the earlier mortgage transaction was entered into, the later one was not even in contemplation, the first mortgage will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee (49 All. 123). The case would be different, if the previous mortgage debt was not a *bona fide* debt, but a debt colourably incurred for the purposes of forming an *unreal* antecedence as the basis of the subsequent mortgage.

A Hindu father cannot validly mortgage joint family property as a security for an advance made to him at the time of the mortgage, the mortgage being for no antecedent debt or legal necessity. Such a mortgage, therefore, will not be binding on the sons. Similarly, where the father borrowed money on a promissory note, with the object when he borrowed that it should form a part of a mortgage to be subsequently executed by him, it was *held* that the antecedence was unreal. In such a case, the mortgage as such would not bind the sons' interest, but it may pass the father's interest in the provinces where a private alienation of coparcenary interest is allowed. But even where the mortgage does not bind the sons' interest, the sons will be liable to the mortgagee on the mortgage debt as *simple money debt, i. e.*, as an unsecured debt, provided that it was not incurred for an illegal or immoral purpose, and such a claim is not time-barred. Where, however, the subsequent mortgage to pay off the debt, though in contemplation at the time of the incurring of the debt, is executed in favour of a third party, the antecedence is real (A. I. R. 1940

All. 118). If the agreement is to execute a mortgage, if and when called upon, and the money is lent on this understanding, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage parts of the same transaction but the debt will constitute an antecedent debt within the meaning of Hindu law. The agreement to execute the mortgage must be a genuine agreement and not a device for evading the law (A. I. R. 1938 Mad. 889, F. B.).

A family consisted of a father and his sons. The father executed a mortgage of the joint family property to A in 1905. Then again in 1907, he executed a second mortgage of the same property to B. In 1908, he executed a third mortgage to C to pay off the earlier mortgages to A and B. In a suit by C against the father and sons, it was *held* that the mortgage to C was made to pay off the antecedent debts to A and B, and hence it was binding on the sons' interest. The question here was whether the mortgage to C was supported by an antecedent debt, and not whether the mortgages to A and B were so supported. It was *held*, there was sufficient dissociation in time and fact between the mortgages to A and B, and the mortgage to C to constitute the mortgage to C as one in discharge of antecedent debts (*Brij Narain's case*).

§ 142. What is an illegal or immoral debt. * The fundamental rule is that the sons are not liable for a debt which is *avyavaharika*, translated by Colebrooke, as incurred *for a cause repugnant to good morals*. This limitation of the sons' liability for their father's debts is based upon the following texts: "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath, or sums for which he is a surety, or for a fine or a toll, or the balance of either" (Vrihaspati). "A fine, or the balance of a fine, likewise a bribe, or a toll or the balance of it, are not to be paid by the son; neither shall he discharge *avyavaharika* debts" (Ushana). Thus "by the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the *nature of the debt*, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt" (*Girdharee Lall v. Kantoo*

* Write short note on "Avyavaharika debts." (April, 1943.) State briefly the law relating to immoral (*avyavaharika*) debts. (Oct., 1940.)

Lall, 1 I. A. 321). If the debt is established to be immoral or illegal, it is not necessary to establish that the creditor had notice that it was so (A. I. R. 1943 Mad. 292).

There is a conflict among scholars and in judicial decisions as to the meaning of *avyavaharika* occurring in Ushana's text given above. *Avyavaharika* is rendered as—

“for a cause repugnant to good morals” by Colebrooke,

“not legal or capable of being recovered by a law suit” by Gharpure,

“unusual, or not sanctioned by law or custom” (*Darbar Khachar v. Khachar Hasur*, 32 Bom. 348),

“not lawful or customary” (*per* Asutosh, J., in *Chhakauri Mahton v. Ganga Prasad*, 39 Cal. 862),

“not supportable as valid by legal arguments and on which no right could be established in creditor's favour in a Court of Justice” (*per* Sadashiv Ayyar, J., in *Venugopal v. Ramanadhan*, 37 Mad. 458),

“not righteous or proper” (*Bai Mani v. Usupali*, 33 Bom. L. R. 130),

“of a character which is illegal, dishonest or immoral” (*Govind-prasad v. Raghunathprasad*, 41 Bom. L. R. 589, F. B.).

“The judicial decisions have in many cases accepted the comprehensive term ‘illegal’ or ‘immoral’ as including *avyavaharika*” (*per* Patkar, J., in *Bal v. Maneklal*, 34 Bom. L. R. 55).

In a Bombay case, *avyavaharika* debt was described as a debt which the father as a decent and respectable man ought not to have incurred. The son, it was held, is answerable for debts which are legitimately incurred by the father, but not for those which are attributable to his failings, follies and caprices (*Darbar v. Khachar*, 32 Bom. 348). Thus where a decree was obtained against the father for damages for obstructing the passage of water to the property of his neighbour, the judgment debt was held to be *avyavaharika* for which the sons were not liable. The Calcutta High Court has dissented from this decision and has held that in such a case the sons are liable (39 Cal. 862), while its authority was doubted by the Bombay High Court itself in a later case, where it was held that a debt contracted by the father in contraven-

tion of the Government Servants' Conduct Rules was *not* *avyavaharika* (*Ramkrishna v. Narayan*, 40 Bom. 126). In a recent Full Bench decision, where the debt was contracted by the father for the purpose of depriving a rightful owner of his property, it was held that the debt incurred was essentially dishonest in character and was incurred for a dishonest purpose, and that, therefore, it was *avyavaharika*, which it was not the pious obligation of the son to pay (41 Bom. L. R. 589). When a father sells family property without the needs of the family requiring the transaction to be entered into, he becomes liable to return to the vendee a proportionate part of the purchase consideration should the other coparceners insist on the sale being set aside so far as they are concerned. If the transaction is set aside after his death, the vendee has a claim against his death and the sons are bound to discharge the claim (A. I. R. 1942 Mad. 183, F. B.).

Under Hindu law, it is the pious duty of the son to pay out of ancestral property the debt of his father incurred on account of trade liabilities, even though the trade may have been started by the father (32 Bom. L. R. 919). Where the father carried on large import business, and accepted bills received through different banks, and mortgaged the joint family property on behalf of himself and his minor sons, it was *held* that, though the father might have acted recklessly or impudently in the management of the business, the debts, which he had incurred in accepting the bills in respect of the goods he had ordered, were neither illegal nor immoral, and that the debts were antecedent and were dissociated in point of fact as well as time from the mortgage, and the sons were bound by the mortgage (*Bal v. Manehlal*, 34 Bom. L. R. 55).

With regard to the pious obligation of the sons to pay the debt of his father, a distinction is drawn between the liability of the son to pay the father's debt in respect of money which was misappropriated by the father and money for which the father was liable on account of a breach of a civil duty (43 Bom. 612 ; 39 Cal. 862). The distinguishing line has to be drawn between a criminal offence and a breach of a civil duty. It would follow from the decided cases that if the liability arises directly from a criminal act, *i.e.*, an act for which the father may or may not have been successfully prosecuted, but *which can or must be presumed*

to be criminal on the evidence on the record, the son would not be bound to pay the father's debt (6 All. 234 ; 24 Cal. 672 ; 27 Mad. 71). Hence, where a father, who is appointed by the Court as the guardian of the minor's property abstracts a sum of money belonging to the minor, his act amounts to the offence of criminal misappropriation, and the son is not liable to pay the debt incurred by the father (33 Bom. L. R. 130 ; *vide*, 56 All. 548, P. C.). On the other hand, where the debt is incurred by the father on account of the breach of a civil duty *and the taking of money is not in itself a criminal offence*, the son *would be liable* to pay the said debt, though the father may be subsequently liable to be prosecuted for criminal misappropriation (31 Mad. 161 ; 472).

Hindu law recognises four kinds of sureties, *viz.*, (1) for appearance, (2) for confidence or honesty, (3) for paying a sum lent, and (4) for delivery of debtor's property, and the surety himself is liable in all these cases. In respect of the former two kinds, the sons may not be liable, but in the latter two, they are expressly declared to be liable (10 Pat. 94 ; A. I. R. 1940 All. 116). But the grandsons are not liable even for these, unless the grandfather received consideration for undertaking the suretyship (28 Bom. 408). The Allahabad High Court differed from this view, saying that that view might be good law under the Mayukha, but it was not so under the Mitakshara ; and observed that under the Mitakshara as regards the grandsons there seems to be no liability at all and that there seems to be no exception as regards the receipt of consideration (1933, 55 All. 675).

A Hindu father executed a surety bond undertaking that a judgment-debtor would file an insolvency application within a specified time. The insolvency petition was not filed and the father died. On a question arising whether his sons were liable on the bond, it was held that the guarantee in question was a guarantee "for confidence" or "for honesty", and that the sons were, therefore, not liable on the bond (58 Mad. 375).

Hindu law and limitation. Ancient Hindu law does not recognise any period of limitation for the recovery of debts. But since the passing of the Indian Limitation Act, a Hindu is not bound to pay a time-barred debt, and hence when a debt is barred

against the father, the sons are no longer under a pious obligation to pay it. A promissory note for a time-barred debt passed by the father is, however, good against him [see Sec. 25 (3), the Indian Contract Act] and after his death against his sons. A time-barred debt is not an immoral debt under Hindu law, and alienations by the father in consideration of a time-barred debt are binding on the sons (*Gajadhar v. Jagannath*, 46 All. 775 ; 34 Bom. L. R. 1005).

Burden of proof. The creditor or alienee under a charge or alienation from a father will have to prove that the antecedent debt existed, or after due inquiries he believed that it existed. The burden then shifts on the son to prove that the particular debt was contracted for an illegal or immoral purpose, and that the purchaser had notice, or upon reasonable inquiry might have discovered, that it was so contracted. It is not sufficient for him to show that the father was generally of licentious and extravagant habits. It must be proved that the *particular debt was incurred for an illegal or immoral purpose*, that is, there must be a distinct connection between the debt and the immorality set up by him (*Shyam Narain v. Suri Narain*, 35 Bom. L. R. 301, P. C.; 41 Bom. L. R. 799 ; 50 All. 1 ; A. I. R. 1941 All. 174).

§143. When sons' interest passes in execution sale. The interest of sons passes in a sale of coparcenary property in execution of a decree against their father, unless (1) the sons prove that the debt was contracted for an illegal or immoral purpose, and in case the purchaser is other than the judgment creditor, also that he had notice, or upon reasonable inquiry could have known, that the debt upon which the decree was obtained was so contracted, or (2) the sons' interest is not sold. The creditor, who wishes to enforce his claim against the interest of the sons, must show that he intended to do so by proceedings in execution, or show that he believed he was doing so from the form of conveyance under which the property was sold. The intention of the creditor to sell the entire property must appear from the suit, or execution proceedings, or proclamation of sale. The Court's intention to sell and the purchaser's intention to buy is a mixed question of law and fact. What was bargained for and paid by the purchaser, what the purchaser had risen to believe he was buying, what the parties contracted for in case the purchaser received an actual

conveyance, delay in proceedings to impeach the sale, are all matters for consideration.

§ 144. The rule of damdupat. * As Hindu law did not recognise any rule of limitation for the recovery of debts, it became necessary to impose restriction on the amount of interest which could be recovered by a creditor. This was done by the rule of damdupat, according to which *the amount of interest recoverable at any one time cannot exceed the principal*. The rule does not mean that the amount of interest shall never exceed the principal. All that the rule forbids is that the creditor cannot, *at any one time*, recover as interest a sum larger than the amount of the principal outstanding at the time. Hence, if, without paying the principal, the interest is paid at different times in sums smaller than the amount of the principal money, there is no limit to the amount which may be recovered as interest. The principal, for the purposes of the rule, is the amount which is outstanding on the balance at the time, so that it may be less than the original principal, if part of it has been paid before, or more than the original principal, if by a subsequent agreement the creditor and debtor agree to capitalise interest by adding it to the principal at a stage when the interest does not exceed the principal. The rule of damdupat applies only in the Bombay Presidency, the town of Calcutta and the Sonthal Parganas. But even there it does not apply (1) when the original debtor is not a Hindu, though the debt may have been subsequently transferred to a Hindu, or (2) in the case of a mortgage with possession, if the mortgagee is bound to account for rents and profits of the mortgaged property, but not otherwise. (3) Though the rule applies to interest before the date of the institution of the suit, the rule does not apply after the institution of the suit, as the Court may award interest at such a rate as it thinks proper from the date of the institution to the date of the decree.

* Explain the rule of *damdupat*. What is the reason for the recognition in Hindu law of this rule? Who are entitled to claim the benefit of this rule? (April, 1935 ; 1941.)

Write a short note on "Rule of Damdupat." (April, 1943). What is the rule of damdupat and to what transaction does this rule apply? (Oct., 1941.)

Chapter XV.

GIFTS AND WILLS.

§ 145. Gifts. Under the Transfer of Property Amendment Act, 1929, the whole of Chapter VII (of Gifts), and Chapter II, which contains general principles of transfer, apply to the Hindus from the 1st of April, 1930. A gift, as defined by the Act, is the transfer of certain *existing* movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor, and while he is still capable of giving. If the donee dies before acceptance, the gift is void (Sec. 122). For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected as in the case of immovable property or by delivery. Such delivery may be made in the same way as goods may be delivered (Sec. 123).

Under pure Hindu law, delivery of possession was essential in every case to validate a gift, and mere registration without delivery was not sufficient. This rule has been abrogated by the above section except in the case of gifts of movable property made in contemplation of death (*donatio mortis causa*) which have been exempted from the operation of the Act by Sec. 129. Hence, such a gift would not be complete without actual delivery.

§ 146. Subject matter of gift. Under Hindu law the following properties can be disposed of by a gift : (1) the separate or self-acquired property ; (2) all property, whether separate or joint, under the Dayabhaga law ; (3) all property in the hands of a sole surviving coparcener ; (4) impartible property, unless there is a special custom prohibiting alienation ; (5) stridhana property of a female ; (6) small portions of property inherited by a widow ; (7) movables inherited or obtained by way of a share on partition by a widow under the Mayukha ; (8) small portions of coparcenary property in hands of the father.

§ 147. Wills. A *will*, as defined in the Indian Succession Act, is the legal declaration of the intentions of a testator with

respect to his property which he desires to be carried into effect after his death. Every Hindu will made after January 1, 1927, must be in writing signed by the testator and attested as provided by Sec. 63 of the Indian Succession Act. Prior to that date, these requirements were necessary only in the case of wills made on or after September 1, 1870, within the territories, or made in relation to immovable property situate within the territories, which at the said date were subject to the Lieutenant-Governor of Bengal, or within the local limits of the ordinary original jurisdiction of the High Courts of Madras or Bombay. The provisions of Secs. 70 and 71 of the Indian Succession Act, as regards revocation of a will and effect of obliteration, interlineation or alternation in a will, apply to wills made according to formalities prescribed by the Act.

Prior to 1870, no Hindu will was required to be in writing, and if it was in writing, it need not have been signed or attested. No specific form of revocation was necessary in the case of such wills, and even parol revocation was sufficient.

§ 148. **Testamentary capacity of a Hindu.** * "It is too late to contend that because the ancient treatises made no mention of will, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous now to be questioned, have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*" (*Beer Pertap v. Rajendra Pertap*, 12 M. I. A. 1). "Even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are *generally* so to be regarded as to the *property* which they can transfer and the *persons* to whom it can be transferred" (*Tagore v. Tagore*, 6 Beng. L. R. 377).

(1) **Capacity to make a will.** Every Hindu, who is of sound mind and not a minor, can make a will. Minority for this purpose is determined by the Indian Majority Act and not by the rules of Hindu law.

(2) **Who can take under a will.** A legatee under a will may be minor or an idiot. Disabilities which exclude a person

* Define the extent of testamentary power of a Hindu. (Oct., 1928; Oct., 1922.)

from inheritance and a share on partition (Chap. XI) do not disqualify a person from taking under a will. (For bequests to unborn persons, see below.)

(3) **Subject matter of a bequest.** A person can dispose of by will only those properties which he can dispose of by a transfer *inter vivos*. But he cannot will away all the properties which he can transfer *inter vivos*. A Hindu can by will dispose of properties mentioned in § 146, except 6, 7, 8.

But the right of a Hindu to make a will is subject to his making an adequate provision for the maintenance of his widow. He cannot so dispose of his property as to free it from her claim of maintenance (89 I. C. 164). A member of an undivided family cannot make a bequest of ancestral property. His interest in such property ceases at his death. As any will by him takes effect from the date of his death, any attempt to deal with ancestral property, even with the undivided share belonging at the time to the testator, is incompetent (28 Bom. L. R. 532). A will by a father of the ancestral property is invalid, although the son consents to it (14 Lah. 178). It would be different if effect is given to the disposition during the father's lifetime (50 Bom. 558). A will, which does not operate as a will at all, may be good evidence of a family arrangement contemporaneously made and acted upon by all the parties. The consent, however, of all the co-sharers must be obtained, and a father, who is a co-sharer with a minor son, cannot give such consent for his minor son (28 Bom. L. R. 910).

(4) A Hindu cannot create an estate repugnant or unknown to Hindu law, or exclude the legal course of inheritance (*vide infra*).

*** Power of Appointment, how far recognised under Hindu law.** When a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property" (Explanation to Sec. 69, Indian Succession Act). A power of appointment is an authority reserved by or limited to a person to deal with or dispose of, either wholly or partially, movable or immovable property, either for his

* What do you know of a power of appointment? Is it recognised in Hindu law? What are the limits to its exercise? Cite cases. (Oct., 1931.)

own benefit, or that of others. In short, a power is the ability to dispose of property independently of any ownership over it, although a power may exist concurrently with such ownership.

A great extension of the testamentary power of the Hindus has been sanctioned by the Privy Council in *Bai Motivahoo v. Bai Mamubai* (24 I. A. 93). In that case, the testator gave property for the benefit of his daughter, Mamu, for life and after her death, of her children during their life and ultimately for their heirs, and then declared : " But should there be no children born to the womb of my daughter, Mamu, then, after the death of Mamu and my wife, Motivahoo, this trust is to become void, and *property delivered to such persons as my daughter, Mamu, may direct it to be delivered by making her will.*" The Privy Council held that this was not an absolute gift to Mamu ; but Mamu had a valid power of appointment. " The result of decisions is that, according to the settled law, if the testator here had himself designated the person who was to take the property in the event of Mamu dying childless, the bequest would be good. The remaining question is, whether this substituting Mamu and giving her power to designate the person by her will is contrary to any principle of Hindu law. *There is an analogy to it in the law of adoption.* A man may by will authorise his wife to adopt a son to him, to do what he had power to do himself, and although here is a strong religious obligation, their Lordships think that the law as to adoption shows, that such a power as now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming a part of Hindu law are applicable to this power, and it is their duty to hold it to be valid." As to the nature of this power, their Lordships were of opinion that the English law of powers was not fit to be applied generally to Hindu law. Their Lordships, however, recently applied a special rule of construing a power under English law to an authority given by a Hindu to his wife to make an adoption to him (*vide, Rajendra Prasad's case*, p. 49).

§ 149. Gift or bequest to unborn persons. * The

* What rules are laid down by Hindu law about gifts to unborn persons and about life-estate ? (Oct., 1926.)

What is the rule of Hindu law in case of bequests to unborn persons ? State if there are any modifications by statute. (April, 1931.)

rule of pure Hindu law was that a Hindu could not dispose of his property by gift or will in favour of an unborn person, on the ground that the donee or legatee must be in existence at the material date. To remove this disability, 3 special Acts were passed, *viz.*, (1) the Hindu Transfers and Bequests Act 1 of 1914, (2) the Hindu Disposition of Property Act, 1916, and (3) the Hindu Transfers and Bequests (City of Madras) Act, 1921.

The first Act applies to the whole of the Madras Presidency, except the town of Madras to which the third Act applies. The Hindu Disposition of Property Act extends to the whole of British India except the province of Madras. The combined effect of the three Acts is to declare that *a gift or a bequest is not invalid by reason only that the transferee or legatee is an unborn person at the date of the gift or the death of the testator as the case may be*; and the rule against perpetuities as enunciated by Sec. 14 of the Transfer of Property Act and Sec. 114 of the Indian Succession Act, and the rule in Sec. 13 of the Transfer of Property Act and Sec. 113 of the Indian Succession Act are applied to gifts and bequests to unborn persons in the case of Hindus. By the recent amendments, the whole of Chap. II of the Transfer of Property Act and Secs. 113, 114, 115 and 116 of the Indian Succession Act have been made applicable to Hindu gifts and bequests respectively.

Hence gifts and bequests to unborn persons are now governed by the following rules : (1) Subject to the rules given below, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person, for whose benefit it may have been made, was not in existence at the date of such disposition.

(2) Where an interest, whether by a transfer *inter vivos* or by will, is created for the benefit of a person not in existence at the date of the disposition, the interest so created shall not take effect unless it comprises the whole of the remaining interest of the transferor or testator as the case may be.

(3) The gift or bequest in favour of an unborn person must not offend against the rule of perpetuity (*vide* Sec. 14 of the Transfer of Property Act and Sec. 114 of the Indian Succession Act).

(4) If a gift or bequest is made to a class of persons with

regard to some of whom it fails by reason of the rules contained in (2) and (3) above, the gift or bequest fails *in regard to those persons only, and not in regard to the whole class*.

(5) If a gift or bequest to a person or to a *class of persons* fails in regard to such person or the *whole of such class*, any gift or bequest in the same disposition and intended to take effect after or upon failure of such gift or bequest also fails.

(6) The rules contained in (3) and (5) do not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Before the recent amendments, a gift or bequest to a class of persons, if it failed as to some because of the rules (2) and (3) above, failed as to the whole class (*Rule in Leake v. Robinson*). When, however, the class itself was ascertained, but some of its members were under a personal incapacity as being not born at the date of the gift or the death of the testator, the gift or bequest took effect as to the persons not so incapacitated.

§ 150. Estates repugnant or unknown to Hindu law.* A Hindu may create a life-estate or successive life-estates or any other estate for a limited period. He may entirely disinherit his son or other heir by bequeathing the whole of his property to another person. But Hindu law does not allow a person to create an estate either by gift or will which would exclude *the legal course of inheritance, i.e.*, which prescribes an order of succession inconsistent with Hindu law. When an estate is given to a person, the estate will pass to his heirs, according to the general law, whether the heir is a son or a widow or a daughter. Hence an attempt to confine succession to males to the entire exclusion of females is a distinct departure from Hindu law (*Tagore v. Tagore*). An estate given to a person and his *male* heirs, known as an estate tail-male in English law, is not known to Hindu law. Similarly, wills and gifts which direct an estate to go in an order of succession which excludes male heirs, or heirs by adoption, or daughters and their issue, would be invalid to that extent. But as a Hindu can create life-estates, he can give a life-estate to a

* Explain fully "Neither a Hindu nor a Mahomedan can create by will estates unknown to the law by which he is governed." Specify the estates unknown to Hindu law. (April, 1930.)

person, with a gift over to his *male* issue only (10 I. A. 51 ; 23 Bom. L. R. 433). Such a grant is in effect a life-estate to the person, and then an absolute gift to his son, which will devolve after him according to the legal course of devolution.

The result of the various decisions on this question of the testamentary power of a Hindu is that, generally speaking, a Hindu may now, by testamentary disposition, create any estate or interest in property so long as such estate or interest does not violate any fundamental principle of Hindu law of inheritance (*Tagore v. Tagore*, 9 Beng. L. R. 377 ; 5 M. I. A. 123). "Inheritance does not depend upon the will of the individual owner ; transfer does. Inheritance is a rule laid down (or, in the case of customs, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by a gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and the gift must fail, and the inheritance takes place as the law directs." "A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy. . . . It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such" (6 M. I. A. 555).

A Hindu testator, by his will dated 1828 at Ahmedabad, gave to his widow a life-interest in his property which was thereafter devised to his daughter or grand-daughter ; on failure of them or their heirs, the property was bequeathed to his grandson ; on his failure to the testator's grandson's daughter, and on failure of the testator's grandson's daughter or her heirs, it was to go to the testator's nephew. It was *held* that, on a proper construction of the will, the testator had attempted to create a series of absolute estates defeasible in succession on the happening of an uncertain event, and that it was an attempt to create a state of inheritance, which was not recognised by Hindu law, and that under the will on the death of the widow, the grandson took an absolute estate, and the subsequent provisions were invalid (*Ambalal v. Ambalal*, 34 Bom. L. R. 1506).

§ 151. Direction for accumulation. A Hindu can direct by a deed of gift or will that the income arising from his property shall be accumulated wholly or in part, provided the direction is only for (1) the life of the donor or the testator, and (2) a period of 18 years from the date of the gift or the death of

the testator. A direction for a longer period shall be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income shall be disposed of, as if the period, during which the accumulation had been directed, had elapsed. This, however, does not affect any direction for accumulation for the purpose of (i) the payment of the debts of the transferor or testator, or any other person taking any interest under the grant, or (ii) the provision of portions for children or remoter issue of the transferor or testator, or of any other person taking any interest under the grant, or (iii) the preservation or maintenance of the property transferred or bequeathed.

§ 152. **Joint donees or devisees.** A gift or bequest to two or more persons, *even though they be members of a coparcenary*, is presumed to give a tenancy-in-common, unless it appears from the terms of the grant that a joint tenancy is given (*Bai Diwali v. Patel Bechardas*, 46 Bom. 445). "The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between members of an undivided Hindu family" (*Jogeswar Narain v. Ramchandra Dutt*, 23 Cal. 670). Thus where a grant of certain village was made by Government to two Hindu brothers and their heirs in lieu of maintenance allowance, it was held that each took a separate estate of inheritance in his share, and that the fact that the grant was made to the two brothers and their heirs was not sufficient for holding that they should take as members of a joint family (*Babu Ram v. Rajendra Bakhsh Singh*, 35 Bom. L. R. 490, P. C.).

§ 153. **Construction of wills.** (1) A benignant construction is to be used. If the real meaning of the document can be ascertained from the language used, mistakes as to names or description, *etc.*, should not be allowed to prevent the real meaning being given effect to.

(2) In arriving at this meaning the Court must look to the intention of the donor or testator from the words used in the document, but the surrounding circumstances, the position of the donor or the testator, the probability that he would use the words in a particular sense, and the ordinary notions and habits of thought of the Hindus, must be regarded. In a recent case, the

Privy Council observed that in construing the will of a Hindu testator, while it is no doubt legitimate to take into consideration what are known to be the ordinary notions and wishes of a Hindu with respect to the devolution of his property, the primary duty of a Court of construction is to give to the words of the will their plain and natural meaning. In other words, even in the case of a Hindu will, where the language is specific and clear, the Court must construe the words as they find them and give effect to the intention of the testator as expressed in the will itself (*Bolo v. Koklan*, 32 Bom. L. R. 1596).

(3) The English rules of construction, which have grown up side by side with a very special law of property and a very artificial system of conveyancing, should be applied to Hindu wills and gifts with great caution. "It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently, from Englishmen" (*Ram Lal v. Kanhai Lal*, 12 Cal. 663).

§ 154. **Gifts and bequests to females.** The question whether a gift or bequest to a female passes an absolute estate or a limited estate is important, because in one case the property would be her stridhana and in the other she would acquire only a woman's estate in it. In the case of a female, the Privy Council has laid down a special rule of construction, that *it may be assumed that the donor or the testator intended her to take a limited estate only, unless the contrary appears from the deed or will*. "It may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate" (*Mahomed Shamsool v. Shewakram*, 2 I. A. 7). Hence, a female takes only a limited estate in property gifted or bequeathed to her, unless it appears from the deed of gift or will that she was given an absolute estate. It is not necessary for this purpose that there should be express and additional terms. *What is essential is that there should be words of sufficient amplitude conferring on the female an absolute estate* (*Ramchandra Rao v. Ramchandra Rao*, 49 I. A. 129). Thus where a gift or bequest to a female is coupled with a power of alienation, or where the word *malik* or other word, importing absolute ownership, is used in the deed or will, the Court readily

infers that the grant is absolute (*Bhaidas v. Bai Gulab*, 49 I. A. 7; *Surajmani v. Rabinath*, 35 I. A. 17). But there is no magic in the use of any particular word or form of words; the document must be construed as a whole and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out, with no reservation, the right of alienation will be included just as any of the other incidents of ownership and just as much where the gift is to a female as where it is to a male (*Jugmohan Singh v. Pandit Singh*, A. I. R. 1930 P. C. 253). Where the gift was to a daughter with a declaration that the daughter should "remain absolute owner" of the property gifted, the words used in the gift deed that the gift was made "for her support and maintenance" did not cut down the estate to a life-estate but the deed conferred upon the donee an absolute estate in the property (*Rai Bishwanath v. Rani Chandrika*, 35 Bom. L. R. 341, P. C.).

For the construction of an interest given to a widow under an award, *vide* 1936, 38 Bom. L. R. 462, P. C.

§ 155. Is probate necessary? In the case of wills to which sub-section (1) of Sec. 57 of the Indian Succession Act *does not apply*, the executor is *not bound* to obtain probate of the will from the Court. The estate vests in the executor of such wills from the date of the testator's death, and the provisions of the Act as to powers, duties, rights and liabilities of executors, *etc.*, apply to such wills and executors, though probate is not granted. But in cases to which the sub-section applies, no right as an executor or legatee can be established in a Court of Justice, unless a probate of the will has been obtained from a competent court. In such a case the probate is not necessary at the time of instituting a suit, but it must be produced before a decree can be obtained. In other words, there is no necessity for an executor or executrix under a will executed by a Hindu to obtain probate. It is only when proceedings have to be taken in a Court of Justice and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the relief he claims, that the Court will insist upon probate or letters of administration being granted before the plaintiff can take advantage of the decree (45 Bom. 1186).

Where a Hindu dies *intestate*, it is not necessary in any case to obtain *letters of administration*. But where no probate or

letters of administration have been obtained before, no Court will grant a decree for money against a debtor of the deceased unless a succession certificate is produced.

Chapter XVI.

BENAMI TRANSACTIONS.

§ 156. **Nature.** A benami transaction is one which has been effected *not* in the name of a person from whom the consideration proceeds, but in the name of another, without any intention to benefit him. Thus where a person buys property with his own money, but in the name of another, or transfers his property to the name of another *without any intention of making a gift of the property to him*, the transaction is *benami*, and the person in whose name the transaction is effected is called *benamidar*. If the benami character is made out, law will give effect to the real title, because in such a case, there will be a resulting trust in favour of the real owner. "Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative" (Sec. 81, the Indian Trusts Act). The criterion is, therefore, to consider from what source the money comes with which the property is purchased.

In India, there is no presumption that when a person purchases property in the name of his wife or child, he intends to make a gift of it. The English doctrine of advancement does not apply in India in the case of natives of the country, as different conditions attach to family life and the social relationships are of an essentially different character (*Guran Ditta v. Ram Ditta*, 31 Bom. L. R. 1384). "Benami purchases in the names of children, without any intention of advancement, are frequent in India" (*Gopeekrist v. Gangapersaud*, 6 M. I. A. 53).

So long as the real title is not established by exposing the benami character of the transaction, the benamidar represents the real owner with regard to the outside world, and any decree pro-

perly obtained against him in suits arising from his dealings with the property will bind the real owner.

§ 157. **When real title not given effect to.** In the following cases, the Court will refuse to give effect to the real title, and “will allow the estate to lie where it falls”:—(1) Where the benamidar is a *certified purchaser* under a court sale (Sec. 66, Civil Pro. Code). (2) Where the property has been transferred by the benamidar to a *bona fide* purchaser for value without notice of the benami character of the property (Sec. 42, T. P. Act). (3) Where the benami transaction was effected with a view to defraud the creditors of the real owner *and* the fraud is effected. (4) Where, but for the benami character, the transaction would be illegal, *e.g.*, when government servants, who are not by law allowed to buy certain properties, buy in the name of others.

Chapter XVII.

IMPARTIBLE ESTATES.

§ 158. **Nature and origin.** The general rule of Hindu law is that all property is divisible equally, in case it belongs to a joint family, among the coparceners, and in case of a separated family, among the heirs of equal degree. There are, however, certain estates which descend only to a single member of the family to the exclusion of others. Such estates are known as *impartible estates*, which in their inception owed their existence to royal grants, for reasons either political, military, religious or personal. The presumption being that all property is partible, impartibility must be pleaded and proved by persons who allege it.

An estate may acquire the character of impartibility by (1) any law for the time being in force, as in the case of the Oudh Estates Act or the Madras Impartible Estates Act, or (2) the terms of the grant from the Government, as such a power has been assured to them by the Crown Grants Act, or (3) its nature, as in the case of a Raj, and of Jaghirs and Saranjams, or (4) by custom. A custom of impartibility must be ancient and invariable, and established by clear and unambiguous evidence. “The custom must be proved by something like what we should in this

country call immemorial usage" (*Martandrao v. Malharao*, 55 Cal. 403, P.C.). An estate cannot be made impartible by an agreement between the parties having claims to it or by a compromise.

* The incidents of an estate proved to be impartible are :
(1) The estate is held by one person at a time, the selection being determined by rules given below.

(2) † Necessarily, therefore, there can be no coparcenary in such an estate (15 I. A. 51). An impartible estate is not held in coparcenary, though it may be joint family property (*Anant v. Shankar*, 1944, 46 Bom. L. R. 1, P. C.). Though in the case of a Mitakshara joint family the successor to the estate will be determined by survivorship, the other characteristics of a coparcenary, such as the right of joint enjoyment and the right to call for a partition, are, by its very nature, absent in an impartible estate (*Rama Rao v. Raja of Pittapur*, 45 I. A. 148). Although other rights which a coparcener acquires by birth in joint family property do not exist in regard to an impartible estate, the birth-right of the senior member to take by survivorship still remains. This right of survivorship is a right which the senior member would acquire by birth (*Krishnayya v. Venkata*, 35 Bom. L. R. 1076, P. C.). As it thus passes by survivorship, an impartible estate, though in the sole enjoyment of the holder for the time being and though alienable by him, must be regarded as the joint property of the holder and his family (42 Bom. L. R. 833).

(3) The income of an impartible estate is the absolute property of the holder of the estate (50 I. A. 1).

(4) The estate is alienable by an act *inter vivos* or by will. Impartibility and inalienability do not necessarily go together, and an impartible estate is *prima facie* alienable, unless it be established to be inalienable in the same ways in which impartibility is established. Even though the impartible estate be an ancestral one, the holder can squander the property, or give or sell it to a stranger. He can also give it to his second son so as to defeat the

* State the incidents of impartible property and the principles governing succession to such property. (Oct., 1941; April, 1943.)
Write short note on : Impartible Property.' (April, 1942.)

† To what extent can an ancestral impartible estate be said to be joint family property? (Oct., 1941.)

right of his eldest son to take it after his death (41 Bom. L. R. 718, P. C.).

(5) There is no right of maintenance of the junior members apart from relationship or custom. Hence, in the case of persons not entitled to maintenance under the general law on the ground of relationship, a custom must be proved entitling them to such a right.

(6) The successor takes the estate subject only to such burdens created and debts payable out of the estate as bind him under the personal law.

It is competent to the holder of an ancestral impartible estate to incorporate other *immovable* property belonging to him. The property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate, and, therefore, passes with the estate by survivorship. The question whether any such property has been impressed with the character of impartibility depends upon the intention of the holder. But neither *movable* property nor the income of an ancestral impartible property can be so incorporated with the estate (*Shib Prasad v. Rani Prayag*, 34 Bom. L. R. 1567, P. C.).

§ 159. Succession to impartible estate. Subject to the rule of primogeniture and any custom establishing a special rule for the selection of the single heir, the ordinary rules of succession to partible property apply to the succession to impartible property. Thus the first thing to be done is to ascertain the class of heirs who would be entitled to succeed in case the property were partible, and then to apply the special rule, or in its absence the rule of primogeniture, for the selection of the single heir. According to the rule of primogeniture, if there are two or more sons of the last owner, the eldest son is entitled to succeed. The eldest son is the son who is *first born*, whether by a senior or junior wife, and not the first born son of a senior wife, unless there is a family custom to that effect. If the eldest son is dead, it will go to his eldest son, and it is only on failure of his line that the estate will go to his brother. In the case of Sudras, a legitimate son, even though younger, will succeed to the exclusion of an illegitimate son. But there is no preference on the ground of nearness of blood in cases of heirs of an equal degree, and an elder brother of half-

blood will succeed in preference to a younger brother of the whole blood.

In the case of a Mitakshara joint family, the selection of a successor is to be determined by survivorship, and the senior member of the family takes the estate by survivorship (*Shiba Prasad's case*). The ancestral impartible estate will, therefore, go to the eldest member in the senior branch of the family. So long as the family continues to be joint, no female can succeed while there is a member qualified to inherit. If the holder of the estate separates from his family, or the estate is his self-acquired property, the female heirs will be entitled to succeed as under the ordinary law of inheritance. Under the Dayabhaga law, as there can be no coparcenary in the Mitakshara sense, the impartible estate in all cases devolves by the rules of succession as modified by the rule of primogeniture or any special custom, and the female heirs will be entitled to inherit the estate as under the ordinary law.

In order to constitute separation with regard to a joint family impartible estate, in addition to the fact of partition, it must be established that there was an intention, expressed or implied, on the parts of separated members to renounce their chance of succession to the impartible property, and it is not sufficient to show a separation merely in food and worship. The material question is whether the separated members have waived their right of succession to impartible estate and have impressed upon it the character of separate property (*Shiba Prasad's case*; *Collector of Gorakhpur*, 36 Bom. L. R. 867, P. C.). The only right which the junior members of a family holding an impartible estate, the succession to which is governed by the rule of lineal primogeniture have, is the right of succession by survivorship, and before it can be held that an impartible estate has ceased to be joint family property for the purposes of succession, there must be reliable evidence to prove an intention, express or implied, on the part of the junior members of the family to give up their chances of succession (42 Bom. L. R. 832).

Chapter XVIII.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

§ 160. **Nature.** An endowment means any property dedicated for religious or charitable purposes, such as the worship of an idol, the feeding of Brahmins or the performance of religious ceremonies. The Hindu ecclesiastical system recognises two classes

of religious institutions, *viz.*, temples or *Devasthanams* and monasteries or *Maths*. The former are places of worship, and large endowments, especially in the shape of lands, assignment of public revenue and jewellery, are made to them. The *maths* are places for the promotion of religious knowledge and the imparting of spiritual instruction to the disciples and followers of the math. In the case of temples, the juridical person is the idol itself, and in the eye of law, all the temple property belongs to it, actual management being carried on by the *shebait*. In the case of *maths*, the juridical person is the office of the spiritual teacher or *acharya*, which is held by the successive *swamis* or heads of the math, known as the *mahants*. But property belonging to a religious institution may, by usage and custom, vest in trustees other than the spiritual head.

* When the endowment is made for the benefit of the public or a section of the public, it is a public endowment. When it is made to a family idol, it is a private endowment in which the public have no interest. Other points of distinction between public and private endowments are : (1) In the case of a private endowment, all the members of the family acting jointly can transfer the endowment with the idol to another family by means of a gift. (2) In the case of a private endowment, the endowed property can, by the consent of all the members of the family, be converted into secular property.

The main characteristic of a public temple is that it is intended for the use of the public at large, or at any rate an indeterminate, though restricted, class of the Hindu community generally. On the other hand, private temples are intended for the worship of the family or other god by members of the family of the donor exclusively. In a private temple, the public have no interest. The fact that worshippers are allowed to visit a temple does not necessarily warrant an inference that the temple is a public religious trust (44 Bom. L. R. 643). Though the public can be allowed access even to a private temple in such a way as to exclude any idea of its being a public institution, such access is only by sufferance. But in the case of a public temple, the public are entitled

* State the distinction between the public and private Hindu religious endowments. (Oct., 1940.)

to the privilege of worship as a matter of right (A. I. R. 1933 Oudh 22).

The following points should be noted on the law of endowments : (1) the rule against perpetuity does not apply ; (2) unlike English law, they are valid even if made for superstitious purposes ; (3) the Indian Trusts Act does not apply to public or private religious or charitable endowments ; (4) Sec. 123, the Transfer of Property Act, which requires that a gift of land must be by a registered instrument does not apply ; and (5) the Religious Endowments Act, which applies to public endowments, does not apply in the Bombay Presidency, except in North Canara. (6) The Courts view endowments with favour. When, however, the object is uncertain and vague (*e. g.*, a gift or bequest to *Dharam*) and does not admit of its administration being controlled by the Court, the endowment is void (*Ranchhoddas v. Parvatibai*, 23 Bom. 725).

§ 161. Creation of endowments. A Hindu can create a religious or charitable endowment of all property which he can alienate by gift or will. No writing is necessary to create an endowment, nor is any trust necessary for the purpose, even in the case of a dedication to an idol which cannot physically hold property, nor is it necessary that there should be any express words of gift to the idol (46 Mad. 300 ; 12 Bom. 247). *All that is necessary is that the objects or religious purposes of the donor should be clearly specified, the property intended for those purposes should be set apart or dedicated for those purposes and the executant should divest himself of the property.* Whether he has so divested himself or not may be determined by his subsequent acts or conduct (34 Bom. L. R. 415). Property may be bequeathed in trust for the establishment of an image, and such a bequest is valid, though the idol is not in existence at the death of the testator.

§ 162. Dedication. No writing is necessary to create an endowment except where the endowment is created by will, in which case the will must be in writing and attested by at least two witnesses if the case is governed by the Indian Succession Act, 1925 (A. I. R. 1942 P. C. 64). In the foundation of a charitable endowment by a Hindu, it is necessary that the donor should divest himself of the property intended for the endowment. Whether he has in fact done so may be determined by evidence of acts contemporaneous with, as well as acts and conduct subsequent

to, the foundation (40 Bom. L. R. 724, P. C.). So long as there is a clear and unequivocal manifestation of intention to dedicate and there is a formal divesting of ownership in the property on the part of the donor and vesting the same in another, or even in the donor himself as a trustee, that is to say, so long as there is a clear change in the tenure of the property with the intention on the part of the donor to devote it to religious or public purposes, dedication thereof must be deemed to be complete (A. I. R. 1938 Lah. 686). The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors (A. I. R. 1937 P. C. 185). The dedication should be real, and not illusory, as when the founder nominally declares the endowment without divesting himself of the property. In such a case, the real purpose of the founder may be to defraud his creditors, or to defeat the provisions of the ordinary law, or to create a perpetuity in favour of his descendants. It is not necessary, however, that the founder should dedicate his whole interest in a property. He may create a charge or trust for a religious or charitable purpose. Where the dedication is absolute, leaving no beneficial enjoyment to the grantee, the property is, in contemplation of law, held by the idol, and is inalienable except for legal necessity. Where, however, property is granted subject to a trust for a religious or charitable purpose, the dedication is partial. The property in such a case belongs primarily to the donee who holds it, and it is partible in the ordinary way, but subject always to the trust or charge in favour of the religious or charitable purpose.

In the absence of any instrument of grant, the mere fact that the profits of any property are used for the support of an idol is not proof that the property was dedicated to the idol. But where the income has been so expended for a long time, it may be a piece of evidence to be taken into consideration in deciding the question in the light of other circumstances.

Dedications of property absolutely for religious or charitable purposes are exempt from the rule against perpetuity. But in the case of partial endowments, the part of the trust creating perpetuity in favour of religious or charitable purposes is valid, while that in favour of the donees is invalid, and the property will pass as on intestacy, but subject to the trust.

§ 163. **Management of endowed property.** Property absolutely dedicated to religious or charitable purposes is called *debutter* property.* If it is dedicated to a math or monastery, it vests in the mahant or the head of the math, and in case of dedication to a *devasthanam* or temple, it vests in the idol. An idol is a juridical person, but it is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager of the temple (*Prosunno Kumari v. Gulab Chand*, 2 I. A. 145). A *shebait* is a mere manager of the debutter property, and although his rights and duties to some extent resemble those of a trustee, he is not a trustee in the true legal sense of the term inasmuch as the property of the estate is not vested in him (63 Cal. 629). In the case of an absolute debutter, the property of the debutter estate belongs absolutely to the idol. The shebait is not the owner of the property. He has only the title of a manager and consequently a right to possess on behalf of the idol (A. I. R. 1940 Cal. 478). The position of a mahant is somewhat superior to that of a shebait. In the case of a math, the properties endowed to it are held by the mahant as its owner, and the succession to him in such properties follow the succession to the office. The nature of ownership in such properties is an ownership in trust for the math itself (43 I. A. 73 ; 63 Cal. 326). But a mahant is not a trustee in the English sense. He has the right to the enjoyment of the properties during his lifetime, subject of course, to the necessities of the math (A. I. R. 1941 Mad. 449, F. B.).

Suits with regard to temple property can be brought in the name of the idol as represented by the shebait (A. I. R. 1942 Cal. 99 & 390) ; while in regard to the math property they can be brought in the name of the mahant. A decree obtained against a shebait or mahant, except in case of fraud or collusion, is binding upon his successor, even though the decree was obtained by a compromise.

* What do you understand by *debutter* property? To what extent alienation of *debutter* property is allowed under Hindu law? What are the rules with regard to the devolution of the office of Mahant? (April, 1937.)

State briefly the legal status and rights of a Hindu Shebait in respect of endowed property, and discuss whether his office is alienable. (April, 1937).

"The power of a mahant to alienate debutter property is, like the power of a manager of an infant heir, limited to cases of unavoidable necessity" (36 Cal. 1003, P. C., *vide* p. 92). The power of a shebait to alienate the *corpus* of the debutter property is to be measured by the exigencies of the occasion. An alienation of such property cannot be justified, unless it is impracticable to carry out duly the service and worship of the deity, and matters incidental thereto, or to preserve the dedicated property, without incurring the expenditure for the defraying of which the alienation is proposed to be effected, and further, unless the required expenditure cannot be met out of the income of the endowment and without alienating the estate. In short, the shebait's power of alienation must be exercised for purposes of defence and not of aggrandisement, as a shield and not as a sword (53 Cal. 132). A shebait is incompetent to grant a permanent lease of debutter property, unless constrained thereto by unavoidable necessity (A. I. R. 1944 Cal. 211). The position of the head of a *math* must be determined in each case upon the conditions on which the properties to the *math* were given, or which may be inferred from the long established usages and customs of the institution (A. I. R. 1933 Bom. 276). Apart from any question of necessity, a mahant has power to create an interest (*e. g.*, a lease) in property appertaining to the math, which will continue during his own tenure of the office of mahantship of the math, with the result that adverse possession of the particular property will only commence when the mahant, who has disposed of it, ceases to be mahant by death or otherwise. A grant made for a longer period (*e. g.*, a permanent lease) is good, but good only to the extent of the grantor-mahant's tenure of office of mahantship (*Vidya-varuthi*, 48 I. A. 302 ; 50 I. A. 295). A mahant is incompetent to create any interest in respect of the math property which is to enure beyond his life. Where the disposition is an out and out disposition of the math and its properties, such a disposition is void and would in law pass no title, with the result that the possession of the assignee is perforce adverse from the moment of the attempted alienation (27 I. A. 69 ; 37 I. A. 147 ; *vide*, however, 1933 All. L. J. 327, P. C.).

Neither a trustee nor shebait can delegate his authority ; consequently, a lease is invalid if it is granted by a person as attorney

for one who is either a trustee or shebait of the property leased and who did not negotiate or consider the lease or know of it until after its execution. But it is open to a trustee or a shebait to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment (62 Cal. 111).

The powers of a *de facto* and a *de jure* shebait are the same provided he is in actual possession of the office and the debutter estate. The *de facto* shabait can, therefore, maintain a suit for recovery of property appertaining to debutter property (A. I. R. 1938 Cal. 559). Any person interested in the endowment may sue to set aside an improper alienation of its property by the manager. In cases of private debutter or family endowment, all members of family either male or female who are entitled to participate in the worship can be said to be persons interested, but a person who is not a member of the family does not come under that description (A. I. R. 1937 Cal. 559).

§ 164. **Right to offerings.** There is a fundamental distinction between the offerings made to the deity and the offerings made to the mahant personally. If offerings are made to the deity, they belong to the endowment and must be applied by the mahant for the purposes of endowment; on the other hand, if offerings are made to the mahant personally, they do not become merged in the income of the endowment. Whether a particular offering is made to the deity or to the mahant personally depends upon the *intention* of the faithful devotee, and no inflexible rule can be formulated (A. I. R. 1921 Cal. 783).

§ 165. **Devolution of office.** In the case of a math, the succession to the office of the mahant is governed by the usage of each particular math. Generally, the mahant has got the right to nominate his successor in his lifetime or by will. If he does not exercise such a right, the system in some maths is to elect the mahant by all the members of the math.

In the case of a temple, succession to the office of a shebait is governed by the terms of the grant, and in the absence of such a provision, by the custom or usage of the institution, and in the absence of such a custom, the right passes to the founder and his heirs, provided the person on whom the office devolves is not unfit, according to the usages of worship, to perform the rites of the office (A. I. R. 1939 Pat. 1). The shebaiti is property and is

not a catena of successive life estates. It is heritable property, which in the first instance is vested in the founder. The founder may direct that a designated person should hold the office during that person's life, and such direction, subject to relevant conditions as to perpetuity, will be good although it carries no right to the heirs of the grantee and does not amount to a complete disposal of the shebaiti (46 Bom. L. R. 212, P. C.). If the grant of the office is absolute, it is heritable property of the grantee. If it is not absolute and the founder has not provided for the devolution of the office after the lifetime of the grantee, the office reverts to the founder or his heirs (A. I. R. 1943 P. C. 89). The settlor can provide for succession to a shebaitship by a deed or will, so long as he does not attempt to create an estate unknown to Hindu law (60 Cal. 706). Rules of succession to the office of shebait are rendered invalid by reason that they provide for the office to be held by some among the heirs of the settlor to the exclusion of others in a succession differing from the line of Hindu inheritance (60 Cal. 452). It should be noted that the Hindu Inheritance (Disabilities Removal) Act does not affect the old disabilities arising from physical or mental defects so far as they affect a person's right to hold a religious office or service, or of management of any religious or charitable trust. Where the office devolves on more persons than one, they may arrange for the execution of the functions of the office jointly, or by turns, or if a right to receive offerings is attached to the office, they may sue for partition and have their respective periods of service fixed by the Court. If they are members of a Mitakshara joint family, the senior male member is entitled to the management of the property.

Females are not disqualified, simply by reason of their sex, to hold the office of shebaitship of a religious endowment, unless, according to the usage of worship, she cannot perform the rites of the office.

§ 166. Transfer of the right of management. In the absence of any custom or usage to the contrary, or any term to that effect in the deed of endowment, the office of a religious trustee, or the right of management of a religious or charitable endowment, or the religious office attached to a temple or any other endowment, cannot be alienated by the holder of the office (63 Cal. 326 ; A. I. R. 1943 Cal. 613). The rule of necessity extends

only to an alienation of the temporalities of an idol. It does not and cannot be made to apply to an alienation of the spiritual rights and duties, the fulfilment of which is the primary function of a shebait (53 Cal. 132). The headship of a math is also not a matter of partition. Where a mahant appointed two successors and divided the properties between them, it was *held* that 'this amounted to partition of the office of mahant,' which is illegal (52 Cal. 748). Where, however, there were special circumstances, justifying a division of the several separate *asthals* belonging to a mahant, a division by him of these *asthals* amongst his successors was upheld (31 Bom. L. R. 715, P. C.). In 47 Bom. 722, the Bombay High Court held that an alienation of the office of Pujari to a person outside the family of grantees or to the original grantor thereof is invalid. The Court observed that if one of the members wishes to get rid of his office, he could only do so in favour of the remaining members of the family.

§ 167. **Rights of the founder.** Though the founder cannot resume the property once endowed for a religious and charitable purpose, he possesses the following rights : (1) The founder can determine the line of succession of the shebaitship, provided it does not interfere with the general law of inheritance by the creation of an estate unknown or repugnant to Hindu law (60 Cal. 538). Shebaitship is a kind of property and not merely an office, and the rules of succession laid down in *Tagore v. Tagore* apply to it. Thus the founder can provide for succession to it by deed or will, so long as he does not attempt to create an estate unknown to Hindu law (60 Cal. 796). (2) In case he does not make any provision, the shebaitship will vest in him and his heirs. (3) In case the line provided by the founder fails, the shebaitship reverts to him and his heirs. (4) If the object of the endowment is not carried out, the founder and his heirs may sue to have the property applied to its lawful purpose, or if the trust fails for want of an object, to have the property applied *cy pres*, *i.e.*, to other objects of a similar character.

§ 168. **Removal of Shebait and Mohants.** The Courts have jurisdiction over the management of endowments, to appoint committees to supervise and control the managers, and frame schemes for the management, and can remove a trustee or manager, if necessary for the good of the endowment, as when

there is proof of abuse of the trust, or the appointment of a trustee is invalid, or he has put himself in a position which precludes him from discharging the obligations of his office (*vide*, Secs. 92 and 93 of the Code of Civil Procedure).

§ 169. Limitation. Any property comprised in a Hindu religious or chritable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager shall be deemed to be a trustee within the meaning of Sec. 10 of the Limitation Act. Hence a suit *against* a shebait or mohunt for endowment property cannot be barred by any length of time (Sec. 10, Limitation Act). A suit *by* a shebait or mohunt for the possession of a hereditary office held adversely to him must be brought within 12 years from the date when the possession becomes adverse (Art. 124).

Under Art. 134B of the Limitation Act, a suit to set aside an invalid alienation by a shebait is barred after the lapse of 12 years from the death or removal of the alienating shebait. The right to bring such a suit does not depend upon questions of adverse possession after the death of alienating shebait, nor does it revive on the death or removal of each succeeding shebait. The right to sue is vested in the shebait of an idol and not in the deity. It is, therefore, not correct to say that Art. 134B bars the shebait but not the deity. It bars both (A. I. R. 1944 Cal. 211). Before the introduction of Art. 134B in the Limitation Act by the amending Act of 1929, a suit to set aside an alienation by a shebait was governed by Art. 144 and the period of limitation was twelve years from the date when the alienee's possession became adverse. Art. 134B also applies to suits by a succeeding mohunt to impeach an alienation of the property of the math by his predecessor, and the starting point of limitation is the death, resignation or removal of the predecessor. Where the successor is a minor and his appointment automatically follows the death of the predecessor, he can claim the benefit of his minority under section 6 of the Limitation Act, but where the minor's appointment is made by selection according to the usage of the math after the period of limitation has started to run consequent on the death of the predecessor, section 6 cannot help him (A. I. R. 1941 Mad. 449, F.B.).

APPENDIX.

THE HINDU INHERITANCE (REMOVAL OF
DISABILITIES) ACT, 1928.

BEING

ACT No. XII of 1928.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 20th SEPTEMBER 1928.)

*An Act to amend the Hindu Law relating to exclusion
from inheritance of certain classes of heirs, and
to remove certain doubts.*

Whereas it is expedient to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts ; It is hereby enacted as follows :—

1. (1) This Act may be called *the Hindu Inheritance (Removal of Disabilities) Act, 1928.*

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall not apply to any person governed by the Dayabhaga School of Hindu Law.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or an idiot, shall be excluded from inheritance or from any share in joint family property by reason only of any disease, deformity or physical or mental defect.

3. Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

THE HINDU LAW OF INHERITANCE
(AMENDMENT) ACT, 1929.

BEING

ACT No. II of 1929.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 21st FEBRUARY 1929.)

Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate ; it is hereby enacted as follows :—

1. (1) This act may be called the *Hindu Law of Inheritance (Amendment) Act, 1929.*
Short title, extent and application.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after father's father and before a father's brother :
Order of succession of certain heirs.

Provided that a sister's son shall not include a son adopted after the sister's death.

3. Nothing in this Act shall :—
Savings.

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

THE HINDU GAINS OF LEARNING ACT, 1930.

BEING

ACT No. XXX of 1930.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 25th JULY 1930.)

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.

Whereas it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning ; It is hereby enacted as follows :—

1. (1) This Act may be called *The Hindu Gains of Learning Act, 1930.*
Short title and extent.

(2) It extends to the whole of British India.

2. In this Act, unless there is anything repugnant in the Definitions. subject or context,

(a) “acquirer” means a member of a Hindu undivided family, who acquires *gains of learning* ;

(b) “gains of learning” means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning ; and

(c) “learning” means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

3. Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—
Gains of learning not to be held not to be separate property of acquirer merely for certain reasons.

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family,

or with the aid of the joint funds of his family or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

4. This Act shall not be deemed in any way to affect—
Savings.

(a) the terms or incidents of any transfer of property made or effected before the commencement of this Act,

(b) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act,

(c) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act, or

(d) any remedy or proceeding in respect of such right or liability ;

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding in a Court at such commencement : and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

The Hindu Women's Rights to Property Act, 1937, as amended by Act XI of 1938.

INDIA ACT No. XVIII of 1937.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL
ON THE 14th APRIL 1937.)

An Act to amend the Hindu Law governing Hindu Women's Rights to Property.

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property ; It is hereby enacted as follows :—

1. (1) This Act may be called the Hindu Women's Rights
Short title and to Property Act, 1937.
extent.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate leaving a widow.

3. (1) When a Hindu governed by the Dayabhag school of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property of which he dies intestate to the same share as a son :

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son.

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

The Arya Marriage Validation Act, 1937.

ACT No. XIX of 1937.

(RECEIVED THE ASSENT OF THE GOVERNOR-
GENERAL ON THE 14th APRIL 1937.)

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.

Whereas it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists.

It is hereby enacted as follows :—

1. (1) The Act may be called The Arya Marriage Validation Act.
Short title and extent.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Paraganas, and applies also to all subjects of His Majesty within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

2. Notwithstanding any provisions of Hindu Law, usage or custom to the contrary, no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus, or that either or both of the parties, at any time before marriage belonged to a religion other than Hinduism.

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